# TRANSCRIPT

# OF

# RECORD

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 90.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

NATIONAL EXCHANGE BANK OF PROVIDENCE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Filed May 20, 1907.

(20723)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1907.

## No. 321.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

NATIONAL EXCHANGE BANK OF PROVIDENCE.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a UNITED STATES OF AMERICA, *ss:*
The President of the United States,

To the honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you, between National Exchange Bank of Providence, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of May, in the year of our Lord one thousand nine hundred and seven.

[SEAL.] JAMES H. MCKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—

OLIVER WENDELL HOLMES,
*Associate Justice of the Supreme Court of the United States.*

b *Return on writ of error of United States Circuit Court of Appeals for the First Circuit.*

United States Circuit Court of Appeals for the First Circuit.

And now, here, the judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith, under the seal of the said United States Circuit Court of Appeals a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said United States Circuit Court of Appeals for the First Circuit, have hereto

set my hand and the seal of said court at Boston in the First Judicial Circuit this fourteenth day of May, A. D. 1907.

[SEAL.] JOHN G. STETSON, *Clerk.*

c United States Circuit Court of Appeals for the First Circuit.
October term, 1905.

| | |
|---|---|
| NATIONAL EXCHANGE BANK OF PROVIDENCE, defendant, plaintiff in error, *v.* UNITED STATES OF AMERICA, plaintiff, defendant in error. | No. 617. Error to the Circuit Court of the United States for the District of Massachusetts. |

Judgment in Circuit Court (Lowell, J.), October 2, 1905.

*Certified copy of record and all proceedings in said cause, to and including May 14, 1907.*

1 United States Circuit Court of Appeals for the First Circuit.
October term, 1905.

| | |
|---|---|
| NATIONAL EXCHANGE BANK OF PROVIDENCE, defendant, plaintiff in error, *v.* UNITED STATES OF AMERICA, plaintiff, defendant in error. | No. 617. |

*Writ of error.*

[L. S.] UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the United States of America, plaintiff, and the National Exchange Bank of Providence, a national banking association duly created and existing under the laws of the United States of America, and having its usual place of business at Providence, in the District of Rhode Island, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning

the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the eighth day of November next, in the said Circuit Court of Appeals, that, the record and
2 proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and five.

ALEX. H. TROWBRIDGE,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts.*

Allowed by—

FRANCIS C. LOWELL,
*U. S. Circuit Judge.*

*Return of Circuit Court on writ of error.*

CIRCUIT COURT OF THE UNITED STATES,
*District of Massachusetts, ss.*

And now, here, the judges of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, Clerk of said Circuit Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court, this seventh day of November, A. D. 1905.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

3 TRANSCRIPT OF RECORD OF CIRCUIT COURT.

(Filed in Circuit Court of Appeals November 8, 1905.)

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the last Tuesday of February, being the twenty-eighth day of February in the year of our Lord one thousand nine hundred and five.

Before the honorable William L. Putnam, Circuit Judge.

UNITED STATES OF AMERICA, PLAINTIFF,
*v.*
NATIONAL EXCHANGE BANK OF BOSTON ET AL., defendants.
No. 1191, law docket.

*Writ.*

MASSACHUSETTS DISTRICT, *ss:*

[L. S.] The President of the United States of America, to the marshal of our District of Massachusetts of his deputy, greeting:

We command you to attach the goods or estate of the National Exchange Bank, of Boston, a national banking association duly and legally organized and established under and by virtue of the laws of the United States of America, located and having its usual place of business at Boston, in our District of Massachusetts, to the value of fourteen thousand dollars, and summon it (if it may be found in your district) to appear before our judges of our Circuit Court of said United States, for the First Circuit, next to be holden at Boston, within and for our said District of Massachusetts, on the fifteenth day of October next; then and there in our said court to answer unto the United States of America.

In an action of contract.

4 To the damage of the said United States, as they say, the sum of fourteen thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with you doings therein.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, at Boston, the twenty-seventh day of August in the year of our Lord one thousand nine hundred and one.

L. C. TUCKER, *Deputy Clerk.*

*Officer's return on writ.*

BOSTON, *August 27, 1901.*

UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

Pursuant hereunto I have this day attached a chip, the property of the within-named defendant corporation, and afterwards, on the same day, I summoned said defendant to appear at court as within directed by giving to Charles A. Price, cashier of said defendant corporation, an original summons in hand at Boston.

BENJAMIN P. PICKERING,
*Deputy U. S. Marshal.*

Fees:

| | |
|---|---|
| Service, | $2.00 |
| Travel, | .12 |
| | $2.12 |

This cause was duly entered at the October term of this court, A. D. 1901, when and where the parties appeared by their respective attorneys.

At the entry of said cause the following plaintiff's declaration was filed:

*Plaintiff's declaration.*[a]

(Filed October 15, 1901.)

Count 1. And the plaintiffs say that the pension agent of the plaintiffs at Boston, in said district, lawfully issued a certain check, drawn on the assistant treasurer of the plaintiffs at said Boston, payable to the order of Hannah Smith, a copy whereof with the indorsements thereon is hereto annexed marked "A"; that a signature purporting to be the true and genuine signature of the said Smith was afterwards indorsed thereon; that said signature in fact was not the true and genuine signature of the said Smith, but was false, forged, and counterfeit; that the defendant indorsed said check bearing said false, forged, and counterfeit signature and presented it for payment to the said assistant treasurer, who paid the amount of the same to the defendant. And the plaintiffs say the defendant owes them the amount of said check.

Count 2. And the plaintiffs say the defendant owes them the sum of thirty-six dollars received by the defendant to the use of the plaintiffs.

And the plaintiffs say the foregoing counts numbered 1 and 2 are for one and the same cause of action.

UNITED STATES OF AMERICA,
by H. P. MOULTON,
*United States Attorney.*

At the said term the following demurrer was filed:

*Demurrer of National Exchange Bank of Boston.*

(Filed October 25, 1901.)

Now comes the defendant in the above-entitled case and demurs to each and every count of the plaintiff's declaration, and for cause of demurrer to each count shows:

1. That said count does not state a legal cause of action;

2. That no demand is alleged on the defendant for the amount of the check therein specified;

3. That no notice was given to the defendant that said check bore a false, forged, and counterfeit signature;

4. That no reason is alleged for not making such demand or giving the defendant such notice; or

[a] See Stipulation as to Record, page —, and Motion to Amend Declaration, page —. John G. Stetson, Clerk.

5. That the defendant had, up to the time of the bringing of the suit, any knowledge that said check bore a false, forged, and counterfeit signature.

By its attorney,

CHARLES K. COBB.

6 I hereby certify that I am of opinion that there is such probable ground in law for this demurrer as to make it a fit subject for judicial inquiry and trial, and that it is not intended merely for delay.

CHARLES K. COBB.

This cause was thereupon set down for hearing and fully heard by the court, on demurrer, the honorable Francis C. Lowell, district judge for the district of Massachusetts, sitting on the twenty-ninth day of April, A. D. 1902.

This cause was thence continued under advisement to the May term, A. D. 1902, when the opinion of the court was announced overruling said demurrer.

At the said term the following answer was filed:

*Answer of National Exchange Bank of Boston.*

(Filed June 2, 1902.)

Now comes the defendant and denies each and every allegation in the plaintiff's writ and declaration contained.

And the defendant further answering to all the counts in the plaintiff's declaration says that if the plaintiff shall prove that it paid to the defendant the amount of the checks or any of them set forth in the declaration, and that the signature of the indorser thereon, or on any of them, was a forgery, that the plaintiff, although long since having discovered the forgery, has given to the defendant no notice thereof, and made upon the defendant no demand therefor, and that this suit is not brought within a reasonable time after the alleged payment to the defendant of the checks respectively set forth in the plaintiff's declaration.

And the defendant further answering says that if the plaintiff shall prove that it paid to the defendant the amount of the checks, or any of them, set forth in the declaration, and that the signature of the indorser thereon, or on any of them, was a forgery, all the checks mentioned in the plaintiff's declaration were held by the defendant as agent for collection, and that believing the signatures thereon were

7 the genuine signatures of the indorsers, it has paid out the money collected by it to the person or persons or corporations depositing said checks for collection.

And the defendant further answering says that if the plaintiff shall prove that it paid to the defendant the amount of the checks,

or any of them, set forth in the declaration, and that the signature of the indorser thereon, or on any of them, was a forgery, the plaintiff was in possession of the original signatures of the payees of said checks, which it had obtained for the purpose of verifying the signatures of the payees of said checks, and the plaintiff was negligent in the payment of said checks with the indorsements thereon forged as alleged in the declaration, or in not earlier discovering the alleged forgeries.

By its attorney,

CHARLES K. COBB.

This cause was thence continued from term to term to the October term, A. D. 1903, when the following motion to amend writ was filed and allowed:

*Motion to amend writ.*

(Filed and allowed October 22, 1903.)

Now comes the United States of America, by Henry P. Moulton, United States attorney, and moves to amend its writ in the above-entitled cause, in pursuance of an agreement heretofore made between said United States attorney and Charles K. Cobb, attorney for the National Exchange Bank of Boston, and Theodore Francis Green, attorney for the National Exchange Bank of Providence, as follows, to wit: To amend its writ by inserting therein after the word "Massachusetts," in the ninth line thereof, the words "and the National Exchange Bank of Providence, a national banking association, duly created and existing under the laws of the United States of America, and having its usual place of business at Providence, in the District of Rhode Island;" and by inserting in the eleventh line thereof, after the word "summon," the words "the defendants:" and by inserting in the twelfth line thereof, after the word "if," the word "they;" so that when amended said writ should read as follows:

8 [SEAL.] MASSACHUSETTS DISTRICT, *ss:*

The President of the United States of America, to the marshal of our District of Massachusetts, or his deputy, greeting:

We command you to attach the goods or estate of the National Exchange Bank of Boston, a national banking association duly and legally organized and established under and by virtue of the laws of the United States of America, located and having its usual place of business at Boston, in our District of Massachusetts, and the National Exchange Bank of Providence, a national banking association duly created and existing under the laws of the United States of America, and having its usual place of business at Providence, in the District of Rhode Island, to the value of fourteen thousand dollars, and

summon the defendants (if they may be found in your District) to appear before our judges of our Circuit Court of said United States, for the First Circuit, next to be holden at Boston, within and for our said District of Massachusetts, on the fifteenth day of October next, then and there in our said court to answer unto the United States of America. In an action of contract.

To the damage of the said United States, as they say, the sum of fourteen thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Boston, the twenty-seventh day of August, in the year of our Lord one thousand nine hundred and one.

L. C. TUCKER,
*Deputy Clerk.*
HENRY P. MOULTON,
*U. S. Attorney.*

Assented to.

CHARLES K. COBB,
THEODORE FRANCIS GREEN,
*Attorneys for the National Exchange Bank of Boston, and National Exchange Bank of Providence.*

At the same term the following motion to amend declaration was filed and allowed:

9 *Motion to amend declaration.*

(Filed and allowed October 22, 1903.)

Now comes the United States of America, by Henry P. Moulton, United States attorney, and moves to amend its declaration in the above-entitled cause by striking out the name of the National Exchange Bank of Boston, defendant therein, and inserting as defendant the name of the National Exchange Bank of Providence, and by striking out counts numbered 13, 14, 91, 92, 113, 114, 161, 162, 163, 164, 227, 228, 241, 242, 301, 302, 303, 304, 331, 332, 377, 378, 413, 414, 61, 62, 63, 64, 65, and 66.

HENRY P. MOULTON,
*U. S. Attorney.*

Assented to.

CHARLES K. COBB,
THEODORE FRANCIS GREEN,
*Attorneys for National Exchange Bank of Boston and National Exchange Bank of Providence.*

Also at the same term the following agreement for entry of judgment for National Exchange Bank of Boston was filed:

*Agreement for entry of judgment for National Exchange Bank of Boston.*

(Filed October 22, 1903.)

In the above-entitled cause it is agreed between parties that judgment may be entered for the National Exchange Bank of Boston, without costs.

CHARLES K. COBB,
THEODORE FRANCIS GREEN,
*Attorney for Defendants.*
HENRY P. MOULTON,
*U. S. Attorney.*

Thereupon, to wit, October 22, 1903, judgment was entered for the National Exchange Bank of Boston, pursuant to the foregoing agreement, the honorable Francis C. Lowell, district judge, as aforesaid, sitting.

Also at the same term the following answer of the National Exchange Bank of Providence was filed:

*Answer of National Exchange Bank of Providence.*

(Filed October 28, 1903.)

Now comes the above-named defendant and denies each and every allegation in the plaintiff's writ and declaration contained.

And the defendant, further answering to all the counts in the plaintiff's declaration, says that if the plaintiff shall prove that it paid to the defendant the amount of the checks, or any of them set forth in the declaration, and that the signature of the indorser thereon, or on any of them, was a forgery, that the plaintiff, although long since having discovered the forgery, has given to the defendant no notice thereof and made upon the defendant no demand therefor, and that this suit is not brought within a reasonable time after the alleged payment to the defendant of the checks respectfully set forth in the plaintiff's declaration.

And the defendant, further answering, says that if the plaintiff shall prove that it paid to the defendant the amount of the checks, or any of them, set forth in the declaration, and that the signature of the indorser thereon, or on any of them, was a forgery, the plaintiff was in possession of the original signatures of the payees of said checks, which it had obtained for the purpose of verifying the signatures of the payees of said checks, and the plaintiff was negligent

in the payment of said checks with the indorsements thereon forged as alleged in the declaration, or in not earlier discovering the alleged forgeries.

By its attorney.

CHARLES K. COBB.

This cause was thence continued to the February term, A. D. 1904, when the following-agreed statement of facts was filed:

11 *Agreed statement of facts.*

(Filed March 14, 1904.)

It is stipulated in the above-entitled action that the following facts so far as competent and material are true:

1. All of the checks declared on were issued by the United States pension agent at Boston on the dates set forth in the respective copies, upon the receipt of vouchers, regular in form, and purporting to be executed by the pensioners named therein (the originals of which may be referred to at the trial, and made exhibits), in accordance with the requirements of law contained in sections 4764 and 4765 of the Revised Statutes of the United States relating to the method of paying pensions. Specimen copies of the vouchers sent out to pensioners at the beginning of each quarter at the present time are hereto annexed, marked "A," "B," and "C." The form of voucher in use at the Boston pension agency at the time of issue of the checks in suit was similar to those annexed to this statement.

2. The plaintiff had on its files the signatures of each of the pensioners whose names were forged on vouchers returned prior to the death or remarriage of such pensioners. Such vouchers are agreed to be in evidence and may be referred to by either party.

All the payees named in said checks had formerly been pensioners of the United States, but before the issue of said checks fifteen had died, and the other three, who were widows, had remarried. These facts were not known to said pension agent at the time of the issue of said checks, nor to the defendant at the time of payment.

3. All the checks described in plaintiff's declaration were transmitted by mail by the pension agent directly to the address of the pensioner given in the voucher, in accordance with the provisions of R. S. 4765, none of these supposed pensioners having been theretofore required by the Commissioner of Pensions to appear personally at the agency in Boston to receive his pension.

4. Persons whose names are borne on the rolls as pensioners of the United States are not required by any rule or regulation of the Department of the Interior to furnish the pension agents of their respective districts any evidence of their right to receive a
12 pension other than the vouchers mentioned in R. S. 4764.

When two successive quarters elapse without the return by a pensioner of the vouchers sent out by the pension agent, it is cus-

tomary for the agent to send to the United States postmaster at the place of the pensioner's last known address a card properly filled up, of which the following is the form in use at the Boston pension agency:

UNITED STATES PENSION AGENCY.

At ——— ———.
No. ——. ———, ———, 190–.

SIR: The last known post-office address of ——— ——— was given as ——— ———. If this pensioner is still living, please give me present address. If pensioner is dead, kindly state the date of death.

——— ———, *U. S. Pension Agent.*

Present address: ——— ———.
Died ——— —, ——. ——— ———, *Postmaster.*

This is the ordinary method of obtaining information as to the whereabouts of pensioners, or as to their decease or remarriage. But in the present cases no such information was requested or received, for the reason that no interruption occurred in the receipt by the agent of the executed vouchers.

5. The pension vouchers received by the pension agent at Boston, upon which said checks were issued, were fraudulently filled up and executed, and the supposed signatures of pensioners thereto were forgeries. Said checks with the forged signatures thereon were cashed by the defendant, who immediately indorsed the said checks to a national bank in Boston for collection. The checks were presented by the collecting bank at the subtreasury of the United States in Boston. The collecting bank received payment of the same and accounted for such payment to the defendant.

6. In May, 1897, a special examiner of the Pension Bureau was detailed at Providence to investigate the case of Leonard J. A. Mooy, one of the deceased pensioners, to whom certain of the checks in suit were issued.

13 June 18, 1897, the examiner reported to the Bureau that the signatures of said checks were probably forged by William A. Munson. December 18, 1897, notice was given to defendants by the United States attorney at Providence that Mooy's indorsements to said checks were forged and that at a proper time reclamation would be made for the money paid for them. Said notice was in the following form: "I am instructed by the honorable Commissioner of Pensions to notify you that checks (description omitted) drawn by H. B. Lovering, United States pension agent, Boston, on the assistant United States treasurer, Boston, to the order of L. J. Mooy, for the respective sums of thirty-six dollars were paid through your bank upon its indorsement, and upon the forged indorsement or mark as the Government now claims of said Mooy, and that at a proper time reclamation will be made for the money paid upon said checks by the Government."

Upon further investigation, begun in February, 1898, the other checks were discovered to be forgeries. It is agreed that the dates when such forgeries were discovered are as follows:

Orrin Morton, February 19, 1898.
Mary Lavens, February 19, 1898.
Martha Crompton, February 19, 1898.
Eliza Kennedy, February 25, 1898.
Almira Newell, February 26, 1898.
Abby A. Thurber, February 28, 1898.
Margaret Duff, February 28, 1898.
John O. Hopkins, March 2, 1898.
Hannah Smith, March 5, 1898.
Mahala B. Jaques, March 9, 1898.
Julia Carey, March 11, 1898.
Margaret Sliney, March 18, 1898.
Sarah J. Mott, March 23, 1898.
Diana McCaslin, March 26, 1898.
Susan Raynor, March 31, 1898.
Charlotte Lewis, April 19, 1898.
Susan A. Lake, May 21, 1898.
Mary Shambell, May 28, 1898.

7. At the June term, A. D. 1898, of the United States Circuit Court for the District of Rhode Island one William A. Munson,
14 now deceased, pleaded nolo contendere to an indictment charging him with the crime of uttering and publishing a certain pension check with a false and fraudulent indorsement thereon. Said check is numbered 109188, drawn March 10, 1897, to the order of Charlotte Lewis for twenty-four dollars. A copy of said check is annexed to the declaration in the suit of the United States of America against the National Exchange Bank, number 1191. June 22, 1898, said Munson was sentenced for this crime to imprisonment in the Rhode Island State prison for the term of five years. December 16, 1898, while said Munson was serving his said sentence, he made a declaration in writing in which he admitted that he forged the payees' names to certain pension checks, knowing at the time that said payees were either dead or remarried. A copy of said declaration, omitting the enumeration and description of the checks, is hereto annexed marked "D." All of the checks herein declared on are included in the list contained in Munson's said declaration.

8. July 22, 1898, the United States attorney at Providence, Rhode Island, in behalf of the United States, made a demand in writing upon the defendant for refund of the sums paid by the subtreasury upon the checks in suit, except the following, as to which no notice was given, viz:

Mary Shambell, Nos. 480897, 518360, 558286, 631549, 682306, 735448, 788387, 846103, 902639, 957226.

Susan A. Lake, Nos. 716017, 826265, 931241.

Said demand was in the following form:

"I am instructed by the honorable Commissioner of Pensions to notify you that the United States Government hereby makes reclamation for the money paid by the United States pension agency at Boston on the following-described pension checks, all of which were paid through your bank and upon its indorsement, and at the time of payment bore the forged indorsement of the various payees therein named, which forged indorsements have been discovered by the Government within the last eighteen months and very largely since August, 1897."

A similar notice of reclamation was given by the United States attorney at Providence and served by the United State marshal upon the Providence banks September 6, 1898. No other notice was ever given.

The defendants refused to refund the sums so demanded.

CHARLES K. COBB,
THEODORE FRANCIS GREEN,
*Attorneys for Defendant.*
HENRY P. MOULTON,
*U. S. Attorney.*

[MEMORANDUM. Specimen copies of the vouchers "A," "B," and "C," annexed to the foregoing agreed statement of facts, are bound in at the end of this record. John G. Stetson, clerk.]

"D."

(Copy.)

*Deposition.*

CASE OF WILLIAM A. MUNSON.

On this sixteenth day of December, 1898, at Rhode Island State Prison, Cranston, county of Providence, State of Rhode Island, before me, W. L. Harris, a special examiner of the Bureau of Pensions, personally appeared William A. Munson, who, being by me first duly sworn to answer truly all interrogatories propounded to him during this special examination of aforesaid claim for pension, deposes and says:

I am fifty-eight years of age; my post-office address is Howard road, Rhode Island State Prison, Cranston, Providence County, R. I.

I was acquainted with the following-named pensioners, who resided in or near Providence, R. I.:

| | *Pensioned under* | | | | | |
|---|---|---|---|---|---|---|
| Julia Cary, | Cert. No. 338,949, | who died | March | 5, 1895 |
| Margaret Duff, | " " 408,209, | " " | June | 7, 1897 |
| Marguerite Gelin, | " " 383,125, | " " | April | 23, 1897 |
| John O. Hopkins, | " " 600,924, | " " | Feb. | 3, 1892 |

| | *Pensioned under* | | | | | |
|---|---|---|---|---|---|---|
| Mahala B. Jaques, | Cert. No. | | 236,971, | who died | June | 29, 1886 |
| Eliza Kennedy, | " | " | 125,536, | " " | July | 2, 1890 |
| Susan A. Lake, | " | " | 266,920, | " " | Oct. | 16, 1889 |
| 16 Mary Lavens, | " | " | 289,736, | " " | Sept. | 10, 1895 |
| Charlotte Lewis, | " | " | 318,613, | " " | Jan. | 14, 1892 |
| Diana McCaslin, | " | " | 14,783, | " " | May | 4, 1890 |
| Leonard J. A. Mooy, | " | " | 573,005, | " " | Sept. | 30, 1895 |
| Orrin Morton, | " | " | 251,104, | " " | Feb. | 4, 1897 |
| Almira Newell, | " | " | 197,353, | " " | March | 17, 1887 |
| Susan Rayner, | " | " | 268,102, | " " | Jan. | 26, 1896 |
| Margaret Sliney, | " | " | 392,893, | " " | May | 23, 1896 |
| Hannah Smith, | " | " | 319,345, | " " | Nov. | 10, 1896 |
| Abby A. Thurber, | " | " | 430,878, | " " | Jan. | 24, 1897 |
| Sarah J. Mott, | " | " | 352,115, | remarried | Aug. | 22, 1892 |
| Mary Shambell, and | " | " | 6,580, | " | Sept. | 28, 1892 |
| Martha Crompton, and who died Jan. 22, 1895. | " | " | 209,716, | " | Aug. | 20, 1884 |

After the death or remarriage of the pensioners herein named, the checks for quarterly payments of pension in their several pension claims—which checks were drawn by the United States pension agent, Boston, Massachusetts, to their respective orders—came into my possession, and I received the proceeds of each of said checks, having previously indorsed the name of the particular payee thereon, knowing the payee to be dead.

The checks now exhibited to me are those which were received by me, as before stated, and are described as follows:

[List of checks omitted.]

I hereby certify that in making acknowledgment to the forgery of the pension checks herein enumerated and described I did so of my own free will and accord, and that no promises whatever were held out to me, and neither was I coerced into so doing. The checks bearing name of payee, number and date of issue corresponding to this schedule were all shown to me, and I recognized the name of payee on each check as a forgery, the same being committed by me.

WILLIAM A. MUNSON.

Mr. Munson (William A. Munson) acknowledged the forgery to all pension checks which were shown to him and which corre-
17 sponded in number, name of payee, date of issue and amount, to those enumerated and described in the schedule forming a part hereof, in my presence.

PHILIP R. WEAVER,
*Howard, R. I.*

J. ALBERT MILLERD,
*Howard, R. I.*

Sworn to and subscribed before me this sixteenth day of December, 1898, and I certify that the contents were fully made known to deponent before signing.

W. L. HARRIS,
*Special Examiner.*

This cause was thence continued from term to term to the present February term, A. D. 1905, when the following motion to amend answer of the National Exchange Bank of Providence, is filed and allowed by consent:

*Motion to amend answer of National Exchange Bank of Providence.*

(Filed and allowed by consent March 7, 1905.)

Now comes the defendant, the National Exchange Bank of Providence, and moves to amend its answer by inserting at the end thereof the following:

"This defendant further answering says that if any notice was given to this defendant by the plaintiff of said forgeries, it was not given until an unreasonable time after the discovery of the same, and if the plaintiff had not been negligent in discovery of said forgeries, or if it had given notice promptly of said forgeries, this defendant would have been able to reimburse itself for the money paid out by it to the person or persons or corporations to whom said money was paid."

By its attorney.

CHARLES K. COBB.

18 This cause is thereupon set down for hearing and is fully heard by the court, on agreed statement of facts, the honorable Francis C. Lowell, district judge, as aforesaid, sitting.

On the second day of October, A. D. 1905, the opinion of the court is announced, and the following findings of the court is filed:

*Findings of the court.*

October 2, 1905.

I find for the plaintiff in the sum of five thousand nine hundred and two dollars and eighty cents ($5,902.80), with interest from July 22, 1898, amounting to two thousand five hundred and forty-six dollars and nine cents ($2,546.09), being the date of demand on said checks according to the agreed facts.

I further find for the plaintiff in the sum of one hundred and eight dollars ($108), being the amount of the Mooy checks, together with interest from December 18, 1897, the date of the demand, amounting to fifty dollars and forty-four cents ($50.44).

I further find for the plaintiff in the sum of three hundred and fifty-one dollars and twenty-seven cents ($351.27), the amount of the

checks of Shambell and Lake, with interest from August 27, 1901, the date of the writ, amounting to eighty-six dollars and twenty-two cents ($86.22).

Also on the second day of October, A. D. 1905, the following defendant's bill of exceptions is filed and allowed:

*Defendant's bill of exceptions.*

(Filed and allowed October 2, 1905.)

This was an action of contract brought by the United States against the defendant bank to recover back money paid to the defendant by the United States on certain pension checks, a detailed list of which is set forth in the declaration, indorsed by the defendant and by the National Exchange Bank of Providence, on which the indorsements of the pensioners are alleged to be forged. The writ was dated August 27, 1901. The writ was amended before trial, so as to
19 make the National Exchange Bank of Providence, a party defendant, and judgment was entered for the National Exchange Bank of Boston, so that the real party defendant is the National Exchange Bank of Providence.

The case was tried before the court, jury being waived, on an agreed statement of facts, a copy of which is hereto annexed.

The defendant asked for the following rulings on questions of law:

1. The agreed statement of facts did not warrant a finding for the plaintiff on all of the checks.

2. The same ruling is requested as to the amount paid by the plaintiff on each check.

3. On the agreed statement of facts the finding should be for the defendant.

4. The same ruling is requested as to the amount paid by the plaintiff on each check.

5. It is unnecessary for the defendant to produce any evidence of damage caused by the delay in notifying the defendant of the forgeries. Such damage is presumed.

6. The plaintiff cannot recover the amount paid by it on any check of the forgery of the indorsement of which it failed to give notice within a reasonable time after the discovery of such forgery.

7. The plaintiff cannot recover the amount paid on any check, of the forgery of the indorsement on which it failed to give notice in a reasonable time after the payment of the check.

8. The plaintiff cannot recover the amount paid on any check of the forgery of the indorsement of which it failed to give any notice.

The court declined to give the above rulings, or any of them, and found for the plaintiff in the sum of nine thousand forty four dollars and eighty-two cents, which was the amount paid on all the checks

mentioned in the declaration, and interest thereon from the date of demand therein to the date of the finding; to which refusals to rule the defendant duly excepted.

By its attorney.

CHARLES K. COBB.

October 2, 1905.

Allowed:

FRANCIS C. LOWELL, *U. S. Circuit Judge.*

20 Also on the second day of October, A. D. 1905, the following judgment is entered:

*Judgment.*

October 2, 1905.

It is thereupon considered by the court, to wit, October 2, 1905, the Honorable Francis C. Lowell, circuit judge, sitting, that the said United States of America, plaintiff, recover of the said the National Exchange Bank of Providence, defendant, the sum of nine thousand forty-four dollars and eighty-two cents damages.

A true record.

Attest:

ALEX H. TROWBRIDGE, *Clerk.*

*Stipulation as to record.*

(Filed October 16, 1905.)

Whereas the declaration as amended contains two counts on each check, and as each set of counts on each check is of the same tenor, with the exception of the description of the check,

It is stipulated that the first two counts only of the declaration shall be included in the transcript of record, and that the list of checks following is a correct list of the checks described in the declaration; and,

Whereas the original agreed statements of facts is on file,

It is stipulated that the copy annexed to the bill of exceptions shall not be included in the transcript of record.

WILLIAM H. GARLAND,
*Assistant U. S. Attorney.*

CHARLES K. COBB,
*Attorney for Defendant.*

*List of checks.*

| No. | Date. | Payee. | Amount. |
|---|---|---|---|
| 216543. | Feb. 3, 1897. | Hannah Smith | $36.00 |
| 405319. | March 9, 1897. | " " | 36.00 |
| 409260. | June 9, 1897. | " " | 36.00 |
| 67769. | July 8, 1896. | Margaret Sliney | 24.00 |
| 80656. | Sept. 16, 1896. | Margaret Sliney | 24.00 |
| 21 97274. | Dec. 10, 1896. | " " | 24.00 |
| 365536. | June 10, 1897. | " " | 24.00 |
| 480897. | Jan. 28, 1893. | Mary Shambell | 27.27 |
| 518360. | March 11, 1893. | " " | 24.00 |
| 558286. | June 10, 1893. | " " | 24.00 |
| 631549. | Sept. 14, 1893. | " " | 24.00 |
| 682306. | Dec. 11, 1893. | " " | 24.00 |
| 735448. | March 12, 1894. | " " | 24.00 |
| 788387. | June 9, 1894. | " " | 24.00 |
| 846103. | Sept. 10, 1894. | " " | 24.00 |
| 902639. | Dec. 11, 1894. | " " | 24.00 |
| 957226. | March 4, 1895. | " " | 24.00 |
| 19007. | June 8, 1895. | " " | 24.00 |
| 67518. | Sept. 10, 1895. | " " | 24.00 |
| 118637. | Dec. 10, 1895. | " " | 24.00 |
| 62400. | March 9, 1896. | " " | 24.00 |
| 160153. | June 5, 1896. | " " | 24.00 |
| 69924. | Sept. 10, 1896. | " " | 24.00 |
| 86933. | Dec. 10, 1896. | " " | 24.00 |
| 107910. | March 10, 1897. | " " | 24.00 |
| 146585. | April 27, 1896. | Susan Rayner | 36.00 |
| 138342. | June 5, 1896. | " " | 36.00 |
| 403327. | March 9, 1897. | " " | 36.00 |
| 418135. | June 9, 1897. | " " | 36.00 |
| 557173. | June 10, 1893. | Almira Newell | 36.00 |
| 608523. | Sept. 14, 1893. | " " | 36.00 |
| 658333. | Dec. 9, 1893. | " " | 36.00 |
| 714284. | March 10, 1894. | " " | 36.00 |
| 849085. | Sept. 21, 1894. | " " | 36.00 |
| 878613. | Dec. 10, 1894. | " " | 36.00 |
| 935087. | March 8, 1895. | " " | 36.00 |
| 44909. | Sept. 23, 1895. | " " | 36.00 |
| 111282. | Dec. 14, 1895. | " " | 36.00 |
| 129220. | March 9, 1896. | " " | 36.00 |
| 138148. | June 5, 1896. | " " | 36.00 |
| 164983. | Sept. 25, 1896. | " " | 36.00 |
| 186952. | March 9, 1897. | " " | 36.00 |
| 420183. | June 9, 1897. | " " | 36.00 |
| 954121. | March 9, 1895. | Julia Cary | 24.00 |
| 13412. | June 8, 1895. | " " | 24.00 |
| 68712. | Sept. 23, 1895. | " " | 24.00 |
| 105121. | Dec. 10, 1895. | " " | 24.00 |
| 60177. | March 10, 1896. | " " | 24.00 |
| 52953. | June 4, 1896. | " " | 24.00 |
| 83635. | Sept. 23, 1896. | " " | 24.00 |
| 85866. | Dec. 10, 1896. | Julia Cary | 24.00 |
| 22 499315. | March 10, 1893. | Sarah J. Mott | 36.00 |
| 557274. | June 10, 1893. | " " " | 36.00 |
| 608347. | Sept. 13, 1893. | Sarah J. Mott | 36.00 |
| 662514. | Dec. 9, 1893. | " " " | 36.00 |
| 714277. | March 10, 1894. | " " " | 36.00 |
| 767370. | June 8, 1894. | " " " | 36.00 |
| 419317. | June 9, 1897. | " " " | 36.00 |
| 849955. | Sept. 21, 1894. | " " " | 36.00 |
| 883196. | Dec. 10, 1894. | " " " | 36.00 |
| 935244. | March 9, 1895. | " " " | 36.00 |
| 982947. | June 10, 1895. | " " " | 36.00 |
| 44942. | Sept. 23, 1895. | " " " | 36.00 |
| 88574. | Dec. 9, 1895. | " " " | 36.00 |

| No. | Date. | Payee. | Amount. |
|---|---|---|---|
| 127108. | March 9, 1896. | Sarah J. Mott | $36. 00 |
| 138318. | June 5, 1896. | " " " | 36. 00 |
| 164939. | Sept. 23, 1896. | " " " | 36. 00 |
| 181132. | Dec. 9, 1896. | " " " | 36. 00 |
| 404158. | March 9, 1897. | " " " | 36. 00 |
| 406433. | March 29, 1897. | Orrin Morton | 36. 00 |
| 409826. | June 7, 1897. | " " | 36. 00 |
| 131469. | Jan. 24, 1896. | Leonard J. A. Mooy | 36. 00 |
| 132650. | March 7, 1896. | " " " " | 36. 00 |
| 146941. | June 4, 1896. | " " " " | 36. 00 |
| 699089. | Sept. 13, 1893. | Diana McCaslin | 36. 00 |
| 716092. | March 10, 1894. | " " | 36. 00 |
| 709035. | June 8, 1894. | " " | 35. 00 |
| 828259. | Sept. 10, 1894. | " " | 36. 00 |
| 930015. | March 9, 1895. | " " | 36. 00 |
| 982770. | June 10, 1895. | " " | 36. 00 |
| 45123. | Sept. 9, 1895. | " " | 36. 00 |
| 88438. | Dec. 9, 1895. | " " | 36. 00 |
| 94941. | Mar. 9, 1896. | " " | 36. 00 |
| 138271. | June 5, 1896. | " " | 36. 00 |
| 169165. | Sept. 10, 1896. | " " | 36. 00 |
| 182117. | Dec. 9, 1896. | " " | 36. 00 |
| 405051. | Mar. 9, 1897. | " " | 94. 80 |
| 270020. | Jan. 14, 1892. | Charlotte Lewis | 24. 00 |
| 337554. | May 18, 1892. | " " | 24. 00 |
| 515102. | Mar. 10, 1893. | " " | 24. 00 |
| 577264. | June 12, 1893. | " " | 24. 00 |
| 625673. | Sept. 13, 1893. | " " | 24. 00 |
| 667492. | Dec. 12, 1893. | " " | 24. 00 |
| 730639. | Mar. 12, 1894. | " " | 24. 00 |
| 775813. | June 9, 1894. | " " | 24. 00 |
| 833624. | Sept. 11, 1894. | " " | 24. 00 |
| 890063. | Dec. 10, 1894. | Charlotte Lewis | 24. 00 |
| 23 954006. | Mar. 9, 1895. | " " | 24. 00 |
| 16071. | June 8, 1895. | " " | 24. 00 |
| 62001. | Sept. 10, 1895. | Charlotte Lewis | 24. 00 |
| 112390. | Dec. 10, 1895. | " " | 24. 00 |
| 55035. | Mar. 10, 1896. | " " | 24. 00 |
| 150079. | June 4, 1896. | " " | 24. 00 |
| 74627. | Sept. 11, 1896. | " " | 24. 00 |
| 98054. | Dec. 10, 1896. | " " | 24. 00 |
| 374407. | June 10, 1897. | " " | 24. 00 |
| 55391. | Sept. 10, 1895. | Mary Lavens | 24. 00 |
| 115802. | Dec. 23, 1895. | " " | 24. 00 |
| 61361. | March 10, 1896. | " " | 24. 00 |
| 151054. | June 4, 1896. | " " | 24. 00 |
| 83647. | Sept. 23, 1896. | " " | 24. 00 |
| 109279. | March 10, 1897. | " " | 24. 00 |
| 367392. | June 10, 1897. | " " | 36. 00 |
| 716017. | March 10, 1894. | Susan A. Lake | 36. 00 |
| 826265. | Sept. 10, 1894. | " " " | 36. 00 |
| 931241. | March 9, 1895. | " " " | 36. 00 |
| 983398. | June 10, 1895. | " " " | 36. 00 |
| 92239. | Dec. 9, 1895. | " " " | 36. 00 |
| 128106. | March 9, 1896. | " " " | 36. 00 |
| 138181. | June 5, 1896. | " " " | 36. 00 |
| 169244. | Sept. 10, 1896. | " " " | 36. 00 |
| 182140. | Dec. 9, 1896. | " " " | 36. 00 |
| 397262. | March 9, 1897. | " " " | 36. 00 |
| 297076. | Mar. 5, 1892. | Eliza Kennedy | 36. 00 |
| 330057. | June 7, 1892. | " " | 36. 00 |
| 394014. | Sept. 10, 1892. | " " | 36. 00 |
| 500249. | March 10, 1893. | " " | 36. 00 |
| 552296. | June 9, 1893. | " " | |

| No. | Date. | Payee. | Amount. |
|---|---|---|---|
| 608278. | Sept. 13, 1892. | Eliza Kennedy | $36.00 |
| 663084. | Dec. 9, 1893. | " " | 36.00 |
| 713365. | March 10, 1894. | " " | 36.00 |
| 761970. | June 8, 1894. | " " | 36.00 |
| 849947. | Sept. 21, 1894. | " " | 36.00 |
| 883120. | Dec. 10, 1894. | " " | 36.00 |
| 930180. | March 9, 1895. | " " | 36.00 |
| 991317. | June 10, 1895. | " " | 36.00 |
| 44935. | Sept. 23, 1895. | " " | 36.00 |
| 92248. | Dec. 9, 1895. | " " | 36.00 |
| 126207. | March 9, 1896. | " " | 36.00 |
| 138293. | June 5, 1896. | " " | 36.00 |
| 403088. | March 9, 1897. | " " | 36.00 |
| | 417599. June 9, 1897. | Eliza Kennedy | 36.00 |
| 24 | 739988. April 27, 1894. | Mahala B. Jaques | 36.00 |
| | 849982. Sept. 21, 1894. | " " " | 36.00 |
| 878421. | Dec. 10, 1894. | Mahala B. Jaques | 36.00 |
| 934115. | March 8, 1895. | " " " | 36.00 |
| 982763. | June 10, 1895. | " " " | 36.00 |
| 44908. | Sept. 23, 1895. | " " " | 36.00 |
| 87783. | Dec. 9, 1895. | " " " | 36.00 |
| 127315. | March 9, 1896. | " " " | 36.00 |
| 138137. | June 5, 1896. | " " " | 36.00 |
| 164968. | Sept. 25, 1896. | " " " | 36.00 |
| 174244. | Dec. 9, 1896. | " " " | 36.00 |
| 416518. | June 9, 1897. | " " " | 36.00 |
| 313620. | March 31, 1892. | John O. Hopkins | 36.00 |
| 399912. | Sept. 8, 1892. | " " " | 36.00 |
| 455286. | Dec. 8, 1892. | " " " | 36.00 |
| 510481. | March 9, 1893. | " " " | 36.00 |
| 571552. | June 8, 1893. | " " " | 36.00 |
| 622703. | Sept. 12, 1893. | " " " | 35.00 |
| 674813. | Dec. 8, 1893. | " " " | 36.00 |
| 727498. | March 9, 1894. | " " " | 36.00 |
| 778832. | June 7, 1894. | " " " | 36.00 |
| 880054. | Dec. 8, 1894. | " " " | 36.00 |
| 947576. | March 8, 1895. | " " " | 36.00 |
| 58901. | Sept. 7, 1895. | " " " | 36.00 |
| 109155. | Dec. 7, 1895. | " " " | 36.00 |
| 133417. | March 7, 1896. | " " " | 36.00 |
| 145203. | June 4, 1896. | " " " | 36.00 |
| 168362. | Sept. 9, 1896. | " " " | 36.00 |
| 176412. | Dec. 8, 1896. | " " " | 36.00 |
| 395770. | March 8, 1897. | " " " | 36.00 |
| 410472. | June 8, 1897. | " " " | 36.00 |
| 375342. | June 10, 1897. | Margaret Duff | 36.00 |
| 358657. | April 14, 1897. | Abby A. Thurber | 24.00 |
| 521445. | Dec. 10, 1886. | Martha Crompton | 24.00 |
| 547662. | March 7, 1887. | " " | 36.00 |
| 574961. | June 11, 1887. | " " | 36.00 |
| 621635. | Dec. 7, 1887. | " " | 36.00 |
| 727633. | Dec. 6, 1888. | " " | 36.00 |
| 610648. | Sept. 13, 1893. | " " | 36.00 |
| 660255. | Dec. 9, 1893. | " " | 36.00 |
| 768070. | June 8, 1894. | " " | 36.00 |
| 825071. | Sept. 10, 1894. | " " | 36.00 |
| 881305. | Dec. 10, 1894. | " " | 36.00 |
| 933410. | March 9, 1895. | " " | 36.00 |
| | 982775. June 10, 1895. | Martha Crompton | 36.00 |
| 25 | 39175. Sept. 9, 1895. | " " | 36.00 |
| | 94108. Dec. 9, 1895. | " " | 36.00 |
| 126034. | March 9, 1896. | Martha Crompton | 36.00 |
| 138024. | June 5, 1896. | " " | 36.00 |
| 165101. | Sept. 10, 1896. | " " | 36.00 |
| 185588. | March 9, 1897. | " " | 36.00 |
| 419092. | June 9, 1897. | " " | 36.00 |

*Opinion of the circuit court.*

MAY 26, 1902.

LOWELL, J. The plaintiff's declaration contains many counts arranged in pairs. The pairs are precisely similar except for the dates of the checks therein described. The first pair of counts reads as follows:

"Count 1. And the plaintiffs say that the pension agent of the plaintiffs at Boston, in said district, lawfully issued a certain check, drawn on the assistant treasurer of the plaintiffs, at said Boston, payable to the order of Mahala B. Jaques; a copy whereof with the indorsements thereon is hereto annexed, marked 'A;' that a signature, purporting to be the true and genuine signature of the said Jaques was afterwards indorsed thereon; that said signature, in fact, was not the true and genuine signature of the said Jaques, but was false, forged, and counterfeit; that the defendant indorsed said check bearing said false, forged, and counterfeit signature, and presented it for payment to the said assistant treasurer, who paid the amount of the same to the defendant. And the plaintiffs say the defendant owes them the amount of said check.

"Count 2. And the plaintiffs say the defendant owes them the sum of thirty-six dollars, received by the defendant to the use of the plaintiffs.

"A. United States pension agency, No. 297073.
" Boston, Mass., Mch 5 1892
"Assistant Treasurer of the United States
" Boston, Mass.
" Pay to the order of Mahala B. Jaques 9492 B81
" Thirty-six $^{100}$ Dollars. $36
" 36 Interior
" W. H. OSBORNE,
" *U. S. Pension Agent.*

" Paid Mar. 12, 1892
"ASST. TREAS., *Boston.*
" Indorsements:
" MAHALA B. JAQUES
" *Payee.*
" M. M. ANGELL

26 " Pay Nat. Bank of the Republic, Boston, or order, for collection, for account of First National Bank, Providence, R. I.
" C. E. LAPHAM, *Cashier.*

" Indorsement Guaranteed.
" Nat'l Bank of the Republic, Boston."

To this declaration the defendant demurred on the following grounds:

"1. That said count does not state a legal cause of action;

"2. That no demand is alleged on the defendant for the amount of the check therein specified;

"3. That no notice was given to the defendant that said check bore a false, forged, and counterfeit signature;

"4. That no reason is alleged for not making such demand or giving the defendant such notice; or

"5. That the defendant had, up to the time of the bringing of the suit, any knowledge that said check bore false, forged, and counterfeit signature."

Assuming for the sake of the argument that undue delay on the part of the plaintiff in notifying the defendant of the forgery will defeat the plaintiff's right to recover, this court has to decide if that delay must be negatived in the declaration, or should be set up by way of defence in the answer. The first count of the declaration says nothing about the matter one way or the other. That undue delay is matter of defence is pretty plain. The plaintiff's right of action arises from the mere retention by the defendant of money which, in justice, does not belong to the latter. "Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration and can not equitably be retained." United States v. Park Bank (6 Fed. Rep., 852, 853). It has been decided that no allegation of demand upon the defendant is nesessary to a right of action. Sturgis v. Preston, 134 Mass., 372; Dill v. Wareham, 7 Met., 438. In United States v. Clinton Bank, 28 Fed. Rep., 357, it appears that the defence was set up in the answer. The demurrer, so far as it applies to the first count of the declaration, must therefore be overruled. The second count is plainly good.

Demurrer overruled.

27 *Opinion of the Circuit Court.*

October 2, 1905.

LOWELL, J. This was a suit at law to recover back money paid by the plaintiff to the defendant upon a pension check bearing a forged indorsement. By the agreed statement of facts it appears that the checks were issued quarterly by the United States pension agent at Boston between 1884 and 1897. Some of the persons to whose order the checks were drawn were then dead, others were remarried widows not entitled to a pension. On June 18, 1897, the special examiner of the Pension Bureau reported to the Bureau that the indorsements of some of the checks in suit were probably forged by Munson. On December 18, 1897, notice of these forgeries was given to the defendant by the United States attorney at Providence and the defendant was informed that at a proper time reclamation would be made upon it. At various dates between February 19 and May 28, 1898, the indorsements upon the other checks were discovered to be forgeries. On July 22 the United States attorney made demand upon the defendants. The writ was dated August 27, 1901. The defendant's amended answer set up that the suit was not brought within a reason-

able time after payment of the checks to the defendant; that notice of the forgeries was not given until unreasonable time after their discovery, and that if the plaintiff had not been negligent in the discovery or had promptly given notice thereof the defendant would have been able to reimburse itself for money paid out by it. No evidence appears of the last allegation except that above stated.

One who has paid money to another upon a check bearing a forged indorsement may ordinarily recover back the money paid, even though the other be an innocent holder of the check for value. As a general proposition, this is not disputed. But recovery can not be had where it would be inequitable, and especially where the negligence of the plaintiff in making the payment or his delay after discovering the forgery in notifying the defendant has damaged the latter. The defendant here relies upon the plaintiff's delay in giving notice of the forgery after its discovery. In dealing with

28 commercial paper the rights of the United States are in these respects like those of any other litigant. The delay was considerable—from two to six months. No reason for it is shown, and it must be taken to be unjustified. This, therefore, is the question presented for decision: If A by honest mistake pays money to B upon a check bearing a forged indorsement and then unnecessarily and unreasonably delays to notify B of the discovery of the forgery, can he recover back the money paid from B in the absence of evidence that the delay has worked damage to B?

Upon the whole, the authorities answer this question in the affirmative. Daniel on Neg. Inst. (4th ed.), par. 1372; *Oppenheim* v. *West Side Bank*, 50 N. Y. Sup., 148, 152; *Bank of Commerce* v. *Mechanics Bank*, 55 N. Y., 211, 215; *Kingston Bank* v. *Eltinge*, 40 N. Y., 391, 396; *Mayer* v. *Mayor of New York*, 63 N. Y., 455; *Iron City Bank* v. *Fort Pitt Nat. Bank*, 159 Pa., 46, 52; *Third Nat. Bank* v. *Allen*, 59 Mo., 310; *Koontz* v. *Central Bank*, 51 Mo., 275; *U. S.* v. *Park Bank*, 6 Fed. Rep., 852. In most of the cases cited to support the defendant's contention (see *U. S.* v. *Cooke*, F. C. 14, 855; *U. S.* v. *Cent. Bank*, 6 Fed. Rep., 134; *U. S.* v. *Clinton Bank*, 28 Fed. Rep., 357; *U. S.* v. *Exchange Bank*, 45 Fed. Rep., 163) there was little consideration of the case of delay without resulting damage as distinguished from that of delay with damage shown or reasonably inferred. Payment by mistake is the basis of the plaintiff's recovery. The right based on the mistake is effectual unless the plaintiff is estopped to assert it. Negligence without resulting damage does not create an estoppel. While delay is irritating, while in some cases it may give rise to a presumption of fact that damage has ensued, yet unless by some means or other damage to the defendant is shown mere delay is insufficient to defeat the plaintiff's recovery. In the case at bar damage is alleged, but the agreed facts contain no evidence to support the allegation.

Judgment to be entered for the plaintiff.

29 *Petition for writ of error.*

(Filed October 9, 1905.)

To the honorable the Justices of the United States Circuit Court of Appeals for the First Circuit, or any judge of the Circuit Court of the United States for said district:

And now comes the defendant, the National Exchange Bank of Providence, and complains that in the records and proceedings, and also in the rendition of judgment in the above-entitled action of contract between the United States of America and this defendant, tried in the Circuit Court of the United States for said circuit, at the February term, A. D. 1905, in which judgment was rendered against this defendant on the second day of October, A. D. 1905, manifest error hath intervened, to the great damage of the said defendant.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the United States Circuit Court of Appeals for the First Circuit aforesaid.

By its attorney.

CHARLES K. COBB.

*Assignment of errors.*

(Filed October 9, 1905.)

Now comes this defendant and says that in the records and proceedings of the Circuit Court of the United States for the First Circuit in the above-entitled case there is manifest error, to wit:

First. The said Circuit Court has erred in refusing to give the following rulings, as requested by this defendant, the court having declined to give the above rulings, or any of them, and found for the plaintiff for the total amount paid on all the checks mentioned in the declaration.

"1. The agreed statement of facts did not warrant a finding for the plaintiff on all of the checks.

"2. The same ruling is request' as to the amount paid by the plaintiff on each check.

"3. On the agreed statement of facts the finding should be for the defendant.

30 "4. The same ruling is requested as to the amount paid by the plaintiff on each check.

"5. It is unnecessary for the defendant to produce any evidence of damage caused by the delay in notifying the defendant of the forgeries. Such damage is presumed.

"6. The plaintiff cannot recover the amount paid by it on any check, of the forgery of the indorsement of which it failed to give notice within a reasonable time after the discovery of such forgery.

"7. The plaintiff can not recover the amount paid on any check, of the forgery of the indorsement on which it failed to give notice in a reasonable time after the payment of the check.

"8. The plaintiff can not recover the amount paid on any check, of the forgery of the indorsement of which it failed to give any notice."

NATIONAL EXCHANGE BANK OF PROVIDENCE,
By CHARLES K. COBB,
*Its Attorney.*

*Bond on writ of error.*

(Filed and approved October 9, 1905.)

Know all men by these presents, that we, the National Exchange Bank of Providence, as principal, and Nicholas Sheldon and Francis S. Brownell, as sureties, are held and firmly bound unto the United States of America in the full and just sum of fifteen thousand (15,000) dollars, to be paid to the said United States of America, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with out seals and dated this seventh day of October, in the year of our Lord one thousand nine hundred and five.

Whereas lately at a Circuit Court of the United States for the District of Massachusetts, in a suit depending in said court between United States of America and National Exchange Bank, judgment was rendered against the said National Exchange Bank, and the said National Exchange Bank having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the eighth day of November, A. D. 1905.

31 Now, the condition of the above obligation is such, that if the said National Exchange Bank shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NATIONAL EXCHANGE BANK, [SEAL.]
*Providence, R. I.*
By AUGUSTUS R. PIERCE, *Cashier.*
NICHOLAS SHELDON. [SEAL.]
FRANCIS S. BROWNELL. [SEAL.]

Sealed and delivered in presence of—
GEORGE G. WOOD, as to all.
HENRY FULLER, as to all.

Approved:

FRANCIS C. LOWELL,
*U. S. Circuit Judge.*

*Citation on writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the United States of America, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the eighth day of November next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Massachusetts, wherein the National Exchange Bank of Providence, a national banking association, duly created and existing under the laws of the United States of America, and having its usual place of business at Providence, in the district of Rhode Island, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Francis C. Lowell, judge of the Circuit Court of the United States for the District of Massachusetts, this tenth day of October, in the year of our Lord one thousand nine hundred and five.

FRANCIS C. LOWELL,
*U. S. Circuit Judge.*

32 *Acknowledgment of service on citation on writ of error.*

BOSTON, *October 30, 1905.*

Due and sufficient service of the within citation is hereby accepted in behalf of the United States, defendant in error.

MELVIN O. ADAMS,
*U. S. Attorney.*

*Clerk's certificate.*

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

I, Alexander H. Trowbridge, clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled—

UNITED STATES OF AMERICA, PLAINTIFF,
*v.*
NATIONAL EXCHANGE BANK, OF PROVIDENCE, defendant. } No. 1191, law docket.

in said Circuit Court determined, the stipulation as to record, the opinions of the Circuit Court of May 26, 1902, and of October 2, 1905, the petition for writ of error, the assignment of errors, the bond on writ of error, and also the original citation upon the writ

of error issued in said cause, with the acknowledgment of service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this seventh day of November, A. D. 1905.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

33 Roll No. ——.

(A.)

Army voucher No. ——.

INVALID.

June, 1903.

$——.

Return this voucher for payment to A. J. Hoitt, U. S. pension agent, Boston, Mass.

STATE OF ——, *County of* ——, *ss:*

I, —— ——, clerk of the —— Court of the county and State aforesaid, do hereby certify that —— —— is ——, duly commissioned and qualified, and that he has authority to administer oaths for general purposes; that his commission was dated on the —— day of ——, 1—, and will expire on the —— day of ——, 190–, and that his signature within written is genuine.

Given under my hand and the seal of said court this —— day of ——, 190–.

—— ——, *Clerk.*

*Instructions to officer before whom this voucher is executed.*

The magistrate must carefully compare this voucher with the pension certificate exhibited to him.

Vouchers may be executed before any officer authorized to administer oaths for general purposes. If he has a seal and is required by law to use it to authenticate his official acts, it must be affixed; if not, a certificate of the proper officer, showing the commencement and termination of his term of office, and his signature, must be filed in this agency. Vouchers may also be executed before fourth-class postmasters, their mailing stamps to be used as seals.

The officer will also see that the correct post-office address of the pensioner is inserted in face and in back of voucher, giving street and number (when so designated). He will also give his own post-office address after his official title on face of voucher.

No checks will be sent in care of any person.

The officer will be held strictly responsible for the correctness of his certificate of identity of pensioner, in every particular, pursuant to act of July 7, 1898.

Write name and P. O. address plainly here.

Name, ——— ———; street, ———; city or village, ———; county, ———; State, ———.

34 3—1000.

Roll No. ——.

Unless the instructions on face and back of this voucher are specifically followed the voucher will be returned for correction.

A "A" INVALID. A

Be it known, that I, ——— ———, do solemnly swear that I am the identical person named in pension certificate No. ——, dated the —— day of ———, 1—, in my possession, and now exhibited; that I served in Company ——, ——— Regiment, ——— Volunteers; that my name is inscribed on the rolls of the Boston Agency, at the rate of —— dollars per month ——; when there is a change in the rate, either by an increase, reissue, etc., note the former rate at which paid ———.

That I have not been employed or paid in the Army, Navy, or Marine of the United States from the [a] 4 day of Mar., 1903, to the present time; that I am entitled to the pension described in this voucher; that I have not forfeited my right, title, or interest therein; and that my present post-office address is No. ——, ——— street, county of ———, State of ———.

Street and number should be given.

(Pensioner's signature.) ——— ———

(Signature must be written letter for letter as it is written in the pension certificate.)

(If pensioner signs by mark, or illegibly, two witnesses who can write.)

———— ————.

———— ————.

Officer must make the contents of the affidavit fully known to the pensioner before signing or swearing.

The pension certificate must be exhibited to the magistrate when this voucher is executed.

---

[a] If the first payment, insert the date of the commencement of the pension. If not the first payment, the date from which the payment is claimed.

STATE OF ———, *County of* ———, *ss:*

Subscribed and sworn to before me this —— day of ———, 190–, and I certify that the pensioner, above named, has this day exhibited to me his pension certificate, above described, and was fully identified as the pensioner named therein, and that he signed the following duplicate receipts in my presence.

(Magistrate's signature.) ——— ———,

(Official character.) ——— ———,

(P. O. address.) ——— ———.

(The magistrate must certify to any erasures or alterations.)

Original.

$——. ——— —, *190–*.

Received of A. J. Hoitt, U. S. pension agent at Boston, Mass., ———$\frac{x}{100}$ dollars by check No. —— dated ——— —, 190–, being for 3 months' and —— days' pension due me on pension certificate above described, from the 4 day of Mar., 1903, to the 4 day of June, 1903, for which I have signed duplicate receipts.

——— ———.

(Sign name as above.)

(Witness who can write.)

——— ———.

Subtreasury, Boston.

The pensioner will sign these receipts in the presence of the magistrate.

Duplicate.

$——. (A.) ——— —, *190–*.

Received of A. J. Hoitt, U. S. pension agent at Boston, Mass., ———$\frac{x}{100}$ dollars by check No. —— dated ——— —, 190–, being for 3 months' and —— days' pension due me on pension certificate above described, from the 4 day of Mar., 1903, to the 4 day of June, 1903, for which I have signed duplicate receipts.

——— ———.

(Sign name as above.)

(Witness who can write.)

——— ———.

Also insert post-office address on back of this voucher.

35 Roll No. ——.

(B.)

Army voucher No. ——.

WIDOW.

Dec., 1902.

$——

Return this voucher for payment to A. J. Hoitt, U. S. pension agent, Boston, Mass.

STATE OF ———, *County of* ———, *ss:*

I, ——— ———, clerk of the ——— court of the county and State aforesaid, do hereby certify that ——— ——— is ———, duly commissioned and qualified, and that he has authority to administer oaths for general purposes; that his commission was dated on the —— day of ———, 1—, and will expire on the —— day of ———, 190–, and that his signature within written is genuine.

Given under my hand and the seal of said court this —— day of ———, 190–.

——— ———, *Clerk.*

*Instructions to officer before whom this voucher is executed.*

The magistrate must carefully compare this voucher with the pension certificate exhibited to him.

Vouchers may be executed before any officer authorized to administer oaths for general purposes. If he has a seal and is required by law to use it to authenticate his official acts, it must be affixed; if not, a certificate of the proper officer, showing the commencement and termination of his term of office, and his signature, must be filed in this agency. Vouchers may also be executed before fourth-class postmasters, their mailing stamps to be used as seals.

The officer will also see that the correct post-office address of the pensioner is inserted in face and in back of voucher, giving street and number (when so designated). He will also give his own post-office address after his official title on face of voucher.

No checks will be sent in care of any person.

The officer will be held strictly responsible for the correctness of his certificate of identity of pensioner, in every particular, pursuant to act of July 7, 1898.

Write name and P. O. address plainly here.

Name, ——— ———; street, ———; city or village, ———; county, ———; State, ———.

36 Roll No. ——.

3—1002.

Unless the instructions on face and back of this voucher are specifically followed, the voucher will be returned for correction.

B "B" WIDOW. B

Be it known, that I, ——— ———, do solemnly swear that I am the identical person named in pension certificate No. ——, dated —— day of ———, 1—, in my possession, and now exhibited, and whose name is inscribed on the rolls of the Boston Agency, at the rate of —— dollars per month ———.

That I am the widow of ——— ———, who was a ———, Company ——— Regiment ——— Volunteers; that I have not remarried since the death of said soldier; that I am entitled to the pension named in this voucher; that I have not forfeited my right, title, or interest therein by a violation of any of the provisions of the pension laws; that my post-office address is No. —— street, ———, county of ———, State of ———.

Street and number should be given.

(Pensioner's signature.) ——— ———

(Signature must be written letter for letter as it is written in the pension certificate.)

(If pensioner signs by mark, two witnesses who can write.)

——— ———.

——— ———.

Officer must make the contents of the affidavit fully known to the affiants before signing or swearing.

DEPOSITION OF TWO WITNESSES.

We, the undersigned witnesses, do solemnly swear that we are well acquainted with the above-named pensioner; that she is the identical person she represents herself to be; and that, to our best knowledge and belief, she has not remarried since the death of her late husband, above named; and that our acquaintance with her is such that if she had resumed marriage relations, that fact would have become known to us.

(Witness' signature.) ——— ———,

(P. O. address.) ——— ———.

(Witness' signature.) ——— ———,

(P. O. address.) ——— ———.

(One person, other than magistrate or pensioner, who can write, must attest the signature of one or both witnesses, if by mark. Witnesses must not attest each other's signatures.)

——— ———.

Street and number should be given.

The pension certificate must be exhibited to the magistrate when this voucher is executed.

STATE OF ———, *County of* ———, *ss:*

Personally appeared before me, this —— day of ———, 190–, the witnesses whose signatures and post-office addresses appear above, whom I believe to be credible persons, and the pensioner, above named, and made oath in due form of law to the truth of the foregoing statements subscribed by them; and I certify that the aforesaid pensioner has this day exhibited to me her pension certificate, above described, and signed the following duplicate receipts in my presence.

(Magistrate's signature.) ——— ———,
(Official character.) ——— ———,
(P. O. address.) ——— ———.

(The magistrate must certify to any erasures or alterations.)

Original.

$——. ——— —, *190–*.

Received of A. J. Hoitt, U. S. pension agent at Boston, Mass., ———$\frac{x}{100}$ dollars by check No. —— dated ——— —, 190–, being for 3 months' and —— days' pension due me on pension certificate above described, from the 4 day of Sept., 1902, to the 4 day of Dec., 1902, for which I have signed duplicate receipts.

——— ———.
(Sign name as above.)

(Witness who can write.)
——— ———.

Subtreasury, Boston.

The pensioner will sign these receipts in the presence of the magistrate.

Duplicate.

$——. (B.) ——— —, *190–*.

Received of A. J. Hoitt, U. S. pension agent at Boston, Mass., ———$\frac{x}{100}$ dollars by check No. —— dated ——— —, 190–, being for 3 months' and —— days' pension due me on pension certificate above described, from the 4 day of Sept., 1902, to the 4 day of Dec., 1902, for which I have signed duplicate receipts.

——— ———.
(Sign name as above.)

(Witness who can write.)
——— ———.

Also insert post-office address on back of this voucher.

BLURR

87 Roll No. ——.

(E.)

Army voucher No. ——.

MOTHER.

Mar., 1903.

$——.

Return this voucher for payment to A. J. Hoitt, U. S. pension agent, Boston, Mass.

STATE OF ——, *County of* ——, *ss:*

I, —— ——, clerk of the —— Court of the county and State aforesaid, do hereby certify that —— —— is ——, duly commissioned and qualified, and that he has authority to administer oaths for general purposes; that his commission was dated on the —— day of ——, 1—, and will expire on the —— day of ——, 190–, and that his signature within written is genuine.

Given under my hand and the seal of said court this —— day of ——, 190–.

—— ——, *Clerk.*

*Instructions to officer before whom this voucher is executed.*

The magistrate must carefully compare this voucher with the pension certificate exhibited to him.

Vouchers may be executed before any officer authorized to administer oaths for general purposes. If he has a seal and is required by law to use it to authenticate his official acts, it must be affixed; if not, a certificate of the proper officer, showing the commencement and termination of his term of office, and his signature, must be filed in this agency. Vouchers may also be executed before fourth-class postmasters, their mailing stamps to be used as seals.

The officer will also see that the correct post-office address of the pensioner is inserted in face and in back of voucher, giving street and number (when so designated). He will also give his own post-office address after his official title on face of voucher.

No checks will be sent in care of any person.

The officer will be held strictly responsible for the correctness of his certificate of identity of pensioner, in every particular, pursuant to act of July 7, 1898.

Write name and P. O. address plainly here.

Name, —— ——; street, ——; city or village, ——; county, ——; State, ——.

RRED COPY

38 3—1008. Roll No.

Unless the instructions on face and back of this voucher are specifically followed, the voucher will be returned for correction.

E "C" MOTHER. E

Be it known, that I, ——— ———, do solemnly swear that I am the identical person named in pension certificate No. ——, dated —— day of ———, 1—, in my possession, and now exhibited, and whose name is inscribed on the rolls of the Boston agency, at the rate of —— dollars per month ———.

That I am the mother of ——— ———, who was a ———, Company ———, Regiment ——— Volunteers; that I have not remarried since the date of the death of said son; that I have been and am still dependent on my pension for support, and that my post-office address is No. ——, ——— street, ———, county of ———, State of ———.

Street and number should be given.

(Pensioner's signature.) ——— ———

(Signature must be written letter for letter as it is written in the pension certificate.)

(If pensioner signs by mark, two witnesses who can write.)

——— ———.

——— ———.

Officer must make the contents of the affidavit fully known to the affiants before signing or swearing.

DEPOSITION OF TWO WITNESSES.

We, the undersigned witnesses, do solemnly swear that we are well acquainted with the above-named pensioner; that she is the identical person she represents herself to be; that, to our best knowledge and belief, she has not remarried since the death of her late son; that her pension is necessary to her as a means of adequate support, and that our acquaintance with her is such that if she had resumed marriage relations, or if she were no longer dependent on her pension for support, the fact would have become known to us.

(Witness' signature.) ——— ———,

(P. O. address.) ——— ———.

(Witness' signature.) ——— ———,

(P. O. address.) ——— ———.

(One person, other than magistrate or pensioner, who can write, must attest the signature of one or both witnesses, if by mark. Witnesses must not attest each other's signatures.)

——— ———.

Street and number should be given.

The pension certificate must be exhibited to the magistrate when this voucher is executed.

STATE OF ———, *County of* ———, *ss:*

Personally appeared before me, this —— day of ———, 190–, the witnesses whose signatures and post-office addresses appear above, whom I believe to be credible persons, and the pensioner above named, and made oath in due form of law to the truth of the foregoing statements subscribed by them; and I certify that the aforesaid pensioner has this day exhibited to me her pension certificate, above described, and signed the following duplicate receipts in my presence.

(Magistrate's signature.) ——— ———,

(Official character.) ——— ———,

(P. O. address.) ——— ———.

(The magistrate must certify to any erasures or alterations.)

Original.

$——. ——— —, *190–*.

Received of A. J. Hoitt, U. S. pension agent at Boston, Mass., ———$\frac{x}{100}$ dollars by check No. —— dated ——— —, 190–, being for 3 months' and —— days' pension due me on pension certificate above described, from the 4 day of Dec., 1902, to the 4 day of Mar., 1903, for which I have signed duplicate receipts.

——— ———.

(Sign name as above.)

(Witness who can write.)

——— ———.

Subtreasury, Boston.

The pensioner will sign these receipts in the presence of the magistrate.

Duplicate.

$——. (E.) ——— —, *190–*.

Received of A. J. Hoitt, U. S. pension agent at Boston, Mass., ———$\frac{x}{100}$ dollars by check No. —— dated ——— —, 190–, being for 3 months' and —— days' pension due me on pension certificate above described, from the 4 day of Dec., 1902, to the 4 day of Mar., 1903, for which I have signed duplicate receipts.

——— ———.

(Sign name as above.)

(Witness who can write.)

——— ———.

Also insert post-office address on back of this voucher.

39 United States Circuit Court of Appeals for the first Circuit.
October term, 1906.

| | |
|---|---|
| NATIONAL EXCHANGE BANK OF PROVIDENCE, plaintiff in error, *v.* UNITED STATES OF AMERICA, DEFENDANT IN error. | No. 617. Error to the Circuit Court of the United States for the District of Massachusetts. |

Before Colt, Putnam, and Aldrich, JJ.

*Opinion of the Court.*

January 2, 1907.

PUTNAM, J. This is an action at law, brought in the Circuit Court by the United States against the National Exchange Bank of Providence, in which a jury was waived in accordance with the statute, and the case was tried by the presiding judge on an agreed statement. The judgment was for the United States, and the defendant below sued out this writ of error. The principal facts are correctly stated in the opinion of the learned judge of the Circuit Court as follows:

"This was a suit at law to recover back money paid by the plaintiffs to the defendant upon pension checks bearing forged indorsements. By the agreed statement of facts it appears that the checks were issued quarterly by the United States pension agent, at Boston, between 1884 and 1897. Some of the persons to whose order the
40 checks were drawn were then dead; others were remarried widows not entitled to a pension. On June 18, 1897, the special examiner of the Pension Bureau reported to the Bureau that the indorsements of some of the checks in suit were probably forged by Munson. On December 18, 1897, notice of these forgeries was given to the defendant by the United States attorney, at Providence, and the defendant was informed that at a proper time reclamation would be made upon it. At various dates between February 19 and May 28, 1898, the indorsements upon the other checks were discovered to be forgeries. On July 22 the United States attorney made demand upon the defendants. The writ was dated August 27, 1901."

The precise form of only one of the so-called checks is shown by the record, as follows:

"United States Pension Agency, No. 297073.
"Boston, Mass., Mch 5 1892
"Assistant Treasurer of the United States
"Boston, Mass.
"Pay to the order of Mahala B. Jaques 9492 B81
"Thirty-six $^{100}$ Dollars. $36
"36 Interior
"W. H. OSBORNE,
"*U. S. Pension Agent.*

"Paid Mar. 12, 1892
"ASST. TREAS., *Boston.*

"Indorsements:

"MAHALA B. JAQUES
"*Payee.*

"M. M. ANGELL

"Pay Nat. Bank of the Republic, Boston or order, for collection, for account of First National Bank, Providence, R. I.

"C. E. LAPHAM,
"*Cashier.*

"Indorsement Guaranteed.
"Nat'l Bank of the Republic, Boston."

This is, however, understood to be a sample of the remaining checks. As they were drawn by the pension agent on the Assistant Treasurer of the United States, the question naturally arises whether, after all, they were anything more than official warrants, a question which we will turn to later. It will be observed, however, that no indorsement by the Exchange Bank appears on the
41 sample shown in the record, and whatever indorsement there is is simply "for collection."

The only question before us was also correctly put by the learned judge of the Circuit Court, as follows: "This, therefore, is the question presented for decision: If A by honest mistake pays money to B upon a check bearing a forged indorsement, and then A unnecessarily and unreasonably delays to notify B of the discovery of the forgery, can he recover back the money paid from B in the absence of evidence that the delay has worked damage to B?" The learned judge said: "Upon the whole, the authorities answer this question in the affirmative." He added as follows: "Negligence without resulting damage does not create an estoppel. In the case at bar, damage was alleged, but the agreed facts contain no evidence to support the allegation." It is to be noted that this case does not involve the rule which arises out of payments by a bank of checks drawn upon itself, bearing an apparent but forged signature of one of its customers. It relates only to the demand for the repayment of money paid on account of forged or false indorsements of signatures of individuals whose signatures the United States were not bound to know, as a bank is bound to know those of its customers. It is also to be noted that there is no suggestion made before us that either the bank in question here or the United States have been guilty of negligence except in the particular to which our attention has been brought, namely, an unreasonable delay on the part of the United States in giving notice of the discovery of the false signatures or forgeries.

Mr. Justice Story, in 1825, in his opinion in United States Bank v. Bank of Georgia, 10 Wheat., 332, closing at pages 343 and 344 a discussion of the relations between a bank and an individual from whom the bank may have received forged circulating bills, apparently its own, and other bills or notes bearing forged signatures, and explaining that, under some circumstances, there is nothing uncon-

scientious in retaining the sums received from the bank "which its acts have deliberately assumed to be genuine," ends as follows:

"If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder,
42 under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility."

The concluding rule thus stated by Mr. Justice Story with regard to commercial bills became thoroughly settled as a principle of law in the United States, it being distinguished from the severer rule which existed in England. It reaches all classes of commercial paper, and never has been questioned by any authority in a positive way. In Bank of Commerce v. The Union Bank, 3 N. Y. Rep. (3 Comstock), 230, 257, decided in 1850, the opinion rendered in behalf of the court by Judge Ruggles, relating to the precise question we have here, closes as follows:

"In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within a reasonable time is excused, provided notice of the forgery is given as soon as it is discovered."

United States v. The Central Bank, 6 Fed Rep., 134, 135, decided in 1881, was supported by the concurring opinions of Judge Butler, district judge for the Eastern District of Pennsylvania; Judge Cadwalader, also a district judge of the same district, and Judge McKennan, a circuit judge, all of them of acknowledged experience and ability. The case involved some very peculiar facts, so that the ruling was broader than anything that we are considering here. Nevertheless, the opinion referred to Cooke v. United States, 91 U. S., 389, in such a way as to adopt the recognition of the peculiar rules relative to commercial paper stated at pages 396 and 397; and, what is important here, it made no exception growing out of any question whether damage ensued from any delay in giving notice of the forgeries. There was an opinion in the same volume by
43 District Judge Choate, of the Southern District of New York, in United States v. National Park Bank, 6 Fed Rep., 852, 854, which sustains the position of the United States taken before us; but it was rested on decisions none of which seem in point. Certainly, in almost every case cited by him, if not in every one, the court or the reporter was particular to state that notice was given immediately on the discovery of the forgery. Many related to the ordinary rule

about money paid under mistake, while the rule with reference to money paid out on commercial paper, like all other rules concerning recourse to parties indorsing such paper, has long been regarded in both the United States and England as peculiar, although, to a certain extent, dealt with, as we have said, more sharply in England than with us.

In United States v. Clinton Bank, 28 Fed. Rep., 357, decided in 1886 by Mr. Justice Brewer, then a Circuit Judge, with regard to the rule which we maintain, the learned judge said that it seemed "to be sustained by the common voice of the authorities." Also, we refer to the notes made by Mr. Justice Holmes to Kent's Commentaries, 12th ed. (1873), vol. 3, *85, where it is stated that recovery may be had by the holder, "provided he has given notice of the forgery as soon as discovered. The same note makes comparison with the more precise rule in England. Note b to page *86, which we understand to be the personal note of Chancellor Kent, recognizes, with reference to negotiable paper, the same condition, namely, that "there be no unreasonable delay after the discovery of the forgery." This is stated unqualifiedly. So the note of the distinguished author J. C. Perkins to Chitty on Contracts, 11th Am. ed. (1874), vol. 2, 931, says as follows: "But the one who has received such counterfeit bills or notes in payment of his debt must return, or offer to return, them in a reasonable time, or he will forfeit his rights to recover the amount of them from the payer."

It is true that, in some of the decisions, the observations pertinent to this case were not strictly necessary, and were in a sense dicta. Nevertheless, what we have cited were the unqualified expressions of learned and experienced judges and authors who were not using them theoretically, but historically. None of them made any exception of the kind claimed by the United States in the case at bar, namely, that the defending bank, in order to meet the demand of the United States, is bound to establish that it suffered detriment by the delay.

44

On the other hand, none of the authorities cited in behalf of the United States sustains them. Daniel on Negotiable Instruments, 5th ed., § § 1371 and 1372, on which they especially rely, confirms the rule as claimed by us. At § 1371 the author says: "It is undoubtedly necessary that the maker, acceptor, or other party, who demands restitution of money paid under a forged indorsement, or under a forged signature of the drawer of a bill, should make the demand without unreasonable delay." This is the rule. At § 1372 Mr. Daniel merely adds: "But there is high authority for the more liberal, and, I think, more just and wiser doctrine," that is, the same as that claimed by the United States. This, so far from denying the established rule, admits it, and it only takes cognizance of some supposed expressions the other way. We have examined all of Mr. Daniel's citations in support of this suggestion, and they fail therein. The first one is Parsons on Bills and Notes, vol. 2, 598. This is probably the edition of 1879, where nothing is stated positively. The learned author there

uses the word "perhaps." Another reference is to Welch v. Goodwin, 123 Mass., 71, 78. In that case it is stated at page 71 that notice was immediately given, and the opinion of the court, at page 78, expressly lays aside the question we have before us. In two of the New York cases referred to it was stated by the reporter that notice of the forgery after it was discovered was immediate. In Third National Bank v. Allen, 59 Mo., 310, and in Lyons City Bank v. Fort Pitt Bank, 159 Pa., 46, the question before us was in no way passed on, nor was it in issue; and the other cases were ordinary suits for the recovery of money paid under mistake of fact. Among the cases not cited by Mr. Daniel, but cited to us at bar, are The United States v. The National Bank of the Republic, 2 Mackey, 289, and United States v. Onondaga Bank, 39 Fed., 259. The first of the two cases passes with those we have already explained, because, at page 297, the opinion observes that the notitce given "seems reasonably prompt, unless there are peculiar circumstances in the case that made it otherwise." In
45 this case the defendant bank was notified within six days after the forgery of the indorsement in question was discovered. In the second case various authorities cited by us are referred to, but notice was given within three days after the forgery or fraud was discovered. All the court says on the point before us is that notice was given as we have observed.

There is an allusion to this topic in Zane on Banks and Banking (1900), 271, which leaves it in precisely the same form as left by Daniel, giving the rule as we give it, with the additional statement as to certain authorities precisely as stated by him.

Some of the cases, in discussing the matter, differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

Consequently, if this were a case of commercial paper proper as known to the law of merchants and between individuals, it is established that unreasonable delay in giving notice after the discovery of the forgeries would have discharged the Exchange Bank, without regard, ordinarily, to any question whether it suffered damage thereby. This, of course, is an exceptional rule, applicable to distinctly commercial paper, because, with regard to liability for money paid on a signature supposed to be genuine, but forged, or paid under any other mistake, in ordinary transactions, it is admittedly necessary that damage should have ensued by reason of any alleged negligence in giving notice of the facts. In conclusion as to this topic, the rule,

as we understand it, is in entire harmony with the fundamental principles of that portion of the commercial law which relates to giving parties to commercial paper notices of defaults. They insist on promptness, but ordinarily require no proof *pro* or *con* on the question whether damage resulted from delays.

46 In the Circuit Court, and also as the case was first argued before us, no claim was made that there is any distinction arising from the fact that what are in question here are what might be called Treasury warrants, instead of checks, or from the further fact that the party who relied on the forged or false indorsements was the United States. The case was submitted in all respects as though the drafts were commercial paper, and the litigation between private individuals. In that view, the only noticeable point was that the exceptional rule in reference to commercial paper had been overlooked. At the conclusion of the arguments we hesitated because we doubted whether, in any view, the United States could lose any rights by laches, and again, because the payments made to the Exchange Bank were on paper which might well be called Treasury warrants. Therefore the case was reargued, but we received therefrom little light of value.

The first doubt is met by Cooke v. United States, 91 U. S., 398, where it seems to have been settled that, in the event officers of the United States are authorized by statute to issue what is in form commercial paper, and do issue it, the relations of the United States thereto are the same as those of individuals. The other doubt is not removed by Cooke v. United States, and it is the more serious one. The usual rule is that, when an officer of a public corporation, be it State, county, or town, draws upon another officer of the same public corporation for the purpose of discharging a public liability, whether the draft is by authorization of statute or by settled usage, it is ordinarily known as a warrant, and is not commercial paper in the sense of the law merchant; and no peculiar estoppel arises with reference to it. On the other hand, with mere warrants, the peculiar advantages of the usual recourse to indorsers which apply to commercial paper according to the law merchant ordinarily fail. Consequently, the United States gain in certain respects by regarding drafts like this in question as commercial paper—that is, as checks—while the disadvantages arising therefrom are relatively small. For this reason, and for some other reasons, some of the statutes, if not all of them, especially section 4768 of the Revised Statutes, describe the instruments in question here as checks. It was apparently

47 assumed by the Circuit Court, and it certainly was not contravened by the United States until we ordered this case reargued, that the paper in suit is strictly commercial; and the same was assumed in cases which we have cited in which the United States were concerned. We may refer especially to United States v. The Central National Bank and United States v. Clinton Bank already explained, in which drafts of paymasters on assistant treasurers of the United States were in question.

Under all the circumstances, whatever might otherwise be our doubts, we think we are controlled by the decisions of the Federal courts which we have cited. These, although all in the Circuit Courts, constitute such a weight of authority, uniform for so long a period, that we can not disregard them.

Inasmuch as the facts in this case have been agreed to by the parties and a jury was waived, we are able to render a final judgment on the record before us. Pullman's Car Company v. Metropolitan Railway Company, 157 U. S., 94, 112; Meyer v. Richards, 163 U. S., 385, 415. Saltonstall v. Birtwell, 150 U. S., 417, 419, is an exceptional case for the reasons stated in the opinion rendered by the Chief Justice.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to enter judgment for the defendant.

*Dissenting opinion.*

ALDRICH, J. It is at least doubtful whether judgment ought to go against the Government under the circumstances of this case.

The moment the United States had paid the Providence Bank money through mistake upon pension checks bearing forged indorsements there was created in its behalf by operation of law the right to recover it back. The question is therefore whether the United States has lost the right. The right might be lost, perhaps, under an effective state of facts upon the ground either of estoppel, laches, or negligence. The majority opinion proceeds upon the idea that the Government can not recover, because it failed upon discovery to give prompt notice of the forgeries and make demand for repayment.

48 It seems to be conceded, and it is unquestionably true, that want of prompt notice in a case like this is not governed by the peremptory and necessary dogmatic rules prevailing in commercial law in respect to bills and notes and other commercial paper circulating in trade. Neither is it a case in which the Government has lost its right through estoppel, because it is not a case where it is shown that the bank was in any way damaged by the delay on the part of the Government in giving notice, and loss or damage is understood to be a necessary element of estoppel by conduct. If the Government therefore has lost its right of recovery, a right which at one time existed, the loss of the right came by reason of negligence or laches resting in the failure to give notice. So it is not a case where diligence is an element of the plaintiff's case in establishing his right, because the right of recovery resulted by operation of law from the fact that the payments were made upon forged indorsements through mistake, and thus it follows, as it seems to me, that the negligence comes into the case as an element of the defence rather than as a necessary element in the plaintiff's case. Delay being a matter of defence, it is difficult to see why it should operate to bar recovery unless the party receiving the money on forged indorsements has been damaged by the delay.

Again, this is not a situation in which prompt notice is required under commercial rules to charge an indorser, as such, upon an instrument. The precise questions are whether laches or negligence are imputable to the Government in a case like this, and, if so, whether a defence results upon such ground by operation of law in favor of a party who, through his own error or mistake, has collected money from the Government upon forged indorsements upon pension warrants or checks and who without proof of change of position or of injury relies solely upon failure of the Government to give prompt notice of the discovery of forgery.

I am aware that the doctrine of the old maxim, "nullum tempus occurrit regi," as well as the ancient and somewhat broader doctrine that negligence is not imputable to a Government, is somewhat relaxed. Still I am not willing to adopt the idea that the authoritative decisions go beyond what is said in Cooke v. United States (91 U. S., 389, 398). In that case the court, after stating the gen-
49 eral rule that laches is not imputable to the Government in its character as sovereign, apparently so far limits the general rule as to allow laches and negligence to operate upon situations involving commercial transactions, and the exceptional rule in respect to commercial transactions was apparently adopted as subject to an important qualification—that is to say, that laches or negligence only operate against the Government, provided a particular official has been specially charged with the performance of a duty which he neglects with consequent loss. That idea seems to have been carefully safeguarded as a qualification upon the limited rule in the following paragraph, on page 398:

"Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty, and authorized to represent the Government in that behalf, neglects that duty, and loss ensues, the Government must bear the consequences of his neglect. But this can not happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted."

Furthermore, I do not accept it as at all clear that payments upon pension warrants or pension checks, if they are checks, which in a sense relate to a Government bounty or gratuity, thus presenting a situation *sui generis*, should be treated as things relating to a commercial transaction, in respect to which the Government comes down from its position of sovereignty and enters the domain of commerce within the view of the expressions of the Supreme Court in Cooke v. United States. There are hundreds of thousands of pension warrants or checks spreading over the entire country, which, under existing conditions and for the convenience of pensioners are cashed at local banks. There is at least some shadow of duty upon the local banks to know whether the pensioner is dead or alive, and whether the indorsements are genuine or forged.

It must often happen, as is shown in this case, that payment through mistake is in one department of the Government and discov-

cry of the forgery in another, and, so far as seen, it is not expressly made the special duty of a particular official to give notice. It is difficult, therefore, to see what particular officials are remiss. Indeed, the majority opinion, in the concluding paragraph upon the defence of negligence, looks upon the question as one which would
50 involve doubt if not controlled by decisions in the Federal courts. It does not seem to me that either the proposition that negligence applies as a general rule to Government transactions of this character has been settled by a controlling weight of authority, or that it ever has been distinctly decided by the United States courts in a case like this that the defence of mere Government delay is an available one in the hands of a party who shows no loss.

I will first call attention to the cases upon which the majority opinion seems to rely. The case United States Bank v. Bank of Georgia (10 Wheaton, 333) related to fraudulently altered bank notes circulating in affairs of commerce, and involved in a general account between two banks, and therefore is not in point here.

The case of United States v. The Central Bank (6 Fed. Rep., 134) was not a pension case, but one involving commercial paper drawn in favor of an individual by a paymaster in the Army, presumably for army supplies. The decision was one apparently without consideration further than to accept the commercial situation there as controlled by the commercial situation involved and passed upon in Cooke v. United States.

In United States v. Clinton National Bank (28 Fed. Rep., 357) the defendant pleaded a delay of ten years after notice and loss by reason of the delay. To this the plaintiff demurred, and the case was accepted as one controlled by Cooke v. United States. The effect of the demurrer was an admission that the bank had suffered actual loss by the delay.

I do not purpose to attempt an analysis of the decisions further than to call attention to the fact that the Clinton Bank case, decided by Mr. Jusice Brewer when a circuit judge, was the only case involving a situation relating to a transaction in the nature of a sovereign gratuity or pension. That case was one of bounty, and perhaps stands as something in the nature of a pension rather than something in the domain of commerce, and it is important to note that actual loss was sustained by the bank. Loss was an important element, and one thus making it an entirely different case from the one at bar.

Now, on the contrary, we have the case of United States v. National Bank (6 Fed. Rep., 852, 854), where the exceedingly
51 well-reasoned opinion was by Judge Choate, in which he points out the distinction between recovery for money paid for counterfeit money and for money paid on fraudulently indorsed drafts, and rests the decision upon the idea that delay in giving notice in the case of a draft for bounty is not a complete defence if unattended with loss. The case of Onondaga County Savings Bank (39 Fed. Rep., 259) was a pension case where the payment was upon forged pension drafts, and upon full con-

sideration was decided favorably to the Government upon the theory that the mistake was a mutual one where parties were equally ignorant, and thus a situation in which there was no greater obligation upon one party than the other to discover the death of the payee and the forgery. Judge Cox's decision also involved an examination of United States v. Clinton National Bank (28 Fed Rep., 357) and United States v. Central Bank (6 Fed. Rep., 134), which he points out as the two cases in which the defendant succeeded, and that in one case there was a delay of twelve years in giving notice after knowledge, and in the other, which was Judge Brewer's case, that there was no notice whatever.

The case of United States v. National Bank of the Republic (2 Mackey's Rep., 289, 296), in the Supreme Court of the District of Columbia, is likewise useful, because it points out the distinction between different kinds of negotiable commercial paper in respect to which the reason for notice is to charge in contract upon the instrument or indorsement, and situations like this, where the recourse is to recover money paid under mistake, where the right rests more upon equitable grounds.

Query whether the doctrine of imputable Government negligence does not depend more upon the question whether the subject-matter of the check or treasury warrant relates to a purely sovereign act or, on the other hand, to something within the domain of commerce, than upon the mere form and transaction of the check or warrant itself. The subject-matter of Cooke v. United States, which was Treasury notes circulating as commercial paper, was something clearly in the domain of commerce, and query whether the medium adopted by the Government for distributing the pension fund is not something relating to a pure act of sovereignty. Apparently a question like that involved in this case has not yet been dealt with
52 by the Supreme Court. Surely Cooke v. United States does not deal with any such question, because it expressly limits itself to situations where the Government comes down from its character as sovereign and enters the domain of commerce.

It would be an inequitable hardship upon the Government, thus discharging a beneficent obligation under circumstances necessarily affording a field of opportunity for deception and fraud difficult to discover under the inherent defects of Government agencies resulting from lack of direct individual or official responsibility, to apply the equitable doctrine of laches as a defence in favor of a party who had received money from the Government on forged indorsements, and who had not been damaged by the delay in ascertaining the fact of the forgery and giving immediate notice, and it would be an unnecessary and unreasonable legal hardship upon the Government, under such circumstances, to have a hard and fast rule that delay shall be an available defence in behalf of one who has not been damaged. At least, in such a sui generis situation, in order to make delay an available defence, it should be incumbent upon a party to show that he has suffered some damage. From the very nature of the situation, in

affairs of government, there must necessarily be more delay than in ordinary commercial affairs, where the discovery and the duty are direct and individual, and in such government situations a defence upon the ground of negligence should depend upon showing that the party has suffered loss or inconvenience.

The delay here was not very considerable, and surely not so much as to create a defence upon the ground of laches; and query, it not being a situation governed by commercial law, whether the delay was sufficient under the circumstances to become an available defence upon the ground of negligence.

But quite aside from the question as to how far negligence in respect to sovereign acts is imputable to the Government, it is well to consider the effect of mere delay in other and different situations without proof of resulting loss. Daniel on Negotiable Instruments, at 1372, in dealing with questions relating to commercial paper, asserts the reasonableness of the wiser and juster doctrine that mere
53 space of time is not important, provided loss or inconvenience does not result.

Where money is paid by mistake upon forged instruments in transactions not governed by legal rules in respect to general negotiable paper, the right of recovery seems to be accepted as one immediately attaching by force of law, and the delay in giving notice is generally accepted as a matter of defence to be set up against recovery, and its effectiveness as a defence seems to depend upon loss. This being so, the burden would seem to be upon the defendant to show the loss. Under such circumstances mere lapse of time and mere delay without prejudice are often spoken of both in England and in this country as of little consequence (18 Am. & Eng. Encyc., 101, note 4; 5 Cyc., 547 (3) and note 42), and injury is often accepted as an element of the defence which prevents recovery by reason of failure to act promptly in giving notice (5 Am. & Eng. Encyc., 1069, notes 1 and 2).

In the Circuit Court, before Judge Lowell, this case was decided for the Government upon the ground that delay unsupported by proof of loss was not a defence. Numerous authorities are cited in the opinion of that court. (141 Fed. Rep., 209.) Quite likely some of the authorities which relate to situations where prompt notice was necessary to create liability may seem not to support the proposition. But such a situation is not at all like the case at bar. If the defence prevails here, it is upon the severe ground that the Government has through delay forfeited an existing right created by law from the mere fact of payment upon forged paper under a mistake, and the forfeiture will be made to operate in favor of one who has not shown that he was injured by the delay; and query whether such an inequitable and embarrassing rule in sovereign affairs would not be too arbitrary and abstract in its application to a government, which in its character as sovereign is endeavoring to distribute something in the nature of charity.

55 United States Circuit Court of Appeals for the First Circuit.
October term, 1906.

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| NATIONAL EXCHANGE BANK OF PROVIDENCE, DEFENDANT, plaintiff in error, *v.* UNITED STATES OF AMERICA, PLAINTIFF, DEFENDANT in error. | No. 617. |

*Judgment in Circuit Court of Appeals.*

January 2, 1907.

This cause came on to be heard April 25 and 26, 1906, upon the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, January 2, 1907, here ordered, adjudged, and decreed as follows: The judgment of the Circuit Court is reversed, and the case is remanded to that court with directions to enter judgment for the defendant.

By the Court:

JOHN G. STETSON, *Clerk.*

56 United States Circuit Court of Appeals for the First Circuit.

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| NATIONAL EXCHANGE BANK OF PROVIDENCE, DEFENDANT, plaintiff in error, *v.* UNITED STATES OF AMERICA, PLAINTIFF, DEFENDANT in error. | No. 617. |

*Clerk's certificate.*

I, John G. Stetson, clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages, numbered 1 to 38, inclusive, hereto prefixed, contain and are a true copy of the writ of error to the circuit court of the United States for the District of Massachusetts, and the return of said Circuit Court thereon, in the cause entitled in said Circuit Court,

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| UNITED STATES OF AMERICA, PLAINTIFF, *v.* NATIONAL EXCHANGE BANK OF BOSTON ET AL., defendants. | No. 1191, law docket. |

I further certify that said pages, numbered 1 to 38, inclusive, contain and are a true copy of the record upon which the said cause was heard in said Circuit Court of Appeals April 25 and 26, 1906.

I further certify that the printed pages, numbered 39 to 53, inclusive, hereto prefixed, contain and are a true copy of the opinion of said Circuit Court of Appeals in said cause, and of the dissenting opinion therein, and that the printed page hereto prefixed, numbered 55, contains and is a true copy of the final judgment entered in said cause January 2, 1907.

I further certify that said printed pages, numbered 1 to 55, inclusive, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals, to and including March 25, 1907, and that a mandate has not issued therein.

In testimony whereof I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this fourteenth day of May, A. D. 1907.

[SEAL.] JOHN G. STETSON, *Clerk.*

57 United States Circuit Court of Appeals for the First Circuit.

NATIONAL EXCHANGE BANK OF PROVIDENCE, plaintiff in error,
*v.*
UNITED STATES OF AMERICA, DEFENDANT in error.

*Petition for writ of error.*

The United States of America, defendant in error in the above-entitled cause, by Henry M. Hoyt, Solicitor-General, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the First Circuit, and that a judgment was rendered therein on the second day of January, 1907, reversing a judgment of the Circuit Court of the United States for the District of Massachusetts in its favor and remanding the case to that court with directions to enter judgment for the defendant; that the matter in controversy in said suit exceeds $1,000 besides costs, to wit, the sum of $9,044.82; that the jurisdiction of none of the courts above mentioned is or was depending in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; that this case does not arise under the patent laws, revenue laws, or criminal laws, and that it is not an admiralty cause; that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore the said United States of America respectfully prays that a writ of error be allowed in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the First Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of
58 the United States, in order that the errors complained of in the assignment of errors to be filed herewith may be reviewed

and, if error be found, corrected according to the laws and customs of the United States.

HENRY M. HOYT,
*Solicitor-General.*

59 UNITED STATES OF AMERICA, *ss:*
*To National Exchange Bank of Providence:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States Circuit Court of Appeals for the First Circuit, wherein United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, associate justice of the Supreme Court of the United States, this tenth day of May, in the year of our Lord one thousand nine hundred and seven.

OLIVER WENDELL HOLMES,
*Associate Justice of the Supreme Court of the United States.*

60 UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

BOSTON, *May 13th, A. D. 1907.*

I hereby certify that I this day at Boston served the within precept by giving to Charles K. Cobb, attorney of record of the within-named National Exchange Bank of Providence, a true copy duly attested of the within precept.

J. H. WATERS,
*Deputy U. S. Marshal.*

Fees:
Service, 2. 00
Travel, .06
2. 06

61 (Indorsement on cover:) File No. 20723. U. S. Circuit Court Appeals, 1st Circuit. Term No. 321. The United States, plaintiff in error, vs. National Exchange Bank of Providence. Filed May 20th, 1907. File No. 20723.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

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THE UNITED STATES, PLAINTIFF IN ERROR,
*v.*
NATIONAL EXCHANGE BANK OF PROVIDENCE. } No. 90.

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## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This action was originally brought against the National Exchange Bank of Boston on August 27, 1901. (Record, p. 4.) On October 2, 1903, the writ was amended by inserting the name of the National Exchange Bank of Providence as the party defendant, and the suit was dismissed as to the National Exchange Bank of Boston. (Record, pp. 7 and 9.)

The action was brought to recover money paid by the subtreasurer of the United States in Boston on checks drawn on said subtreasurer by the United States pension agent at Boston in the name of various parties as payees, the indorsements of said parties on the checks having been forged. The case was tried in the Circuit Court upon an agreed state-

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ment of facts, from which it appears that the checks in question had been drawn by the pension agent upon the receipt of vouchers regularly made out containing proofs of the existence of the parties in whose favor the checks were drawn, the same, however, having been forged; that all of the payees were dead when the checks in their names were drawn, except two, who had been widows, but were remarried; that the names of the payees were forged thereon by one William A. Munson; that upon these forged indorsements the defendant bank cashed the checks and forwarded them to the National Exchange Bank of Boston, which presented them to the subtreasury in Boston, and received the money therefor, and forwarded the same to the defendant; that these checks were issued during the years 1892 to 1897, with the exception of five, in the name of Martha Crompton, which were issued in the years 1886, 1887, and 1888; that the fact that the indorsement upon either of said checks was forged was not discovered until June, 1897, when, on the 18th day of that month, a special examiner reported that the checks issued to L. J. Mooy, three in number, were probably paid upon forged indorsements; that on December 18, 1897, defendant was given notice by the United States Attorney at Providence that Mooy's indorsements on said checks were forged and that reclamation would be made for the money paid upon them; that upon further investigation, which was begun in February, 1898, it was discovered that the indorsements

upon the remaining checks were forged, this fact being ascertained from February 19 to May 28, 1898, and that on July 22, 1898, the United States Attorney at Providence made demand in writing upon the defendant for a refund of the money received upon these checks, in which demand it was stated that the alleged indorsements of the payees on said checks were forgeries. (Record, pp. 10–15 and 18–20.)

The case was heard in the Circuit Court without the intervention of a jury, and judgment was pronounced in favor of the plaintiff in the sum of $9,044.82. (Record, p. 17.) From this judgment a writ of error was sued out from the Circuit Court of Appeals, wherein the judgment of the Circuit Court was reversed, and plaintiff's action dismissed, and the case was remanded to the Circuit Court with directions to enter judgment for the defendant (Record, p. 47). To review the latter judgment plaintiff has removed the case to this court by writ of error, and has assigned the following errors:

> 1. Said court erred in holding that the plaintiff in error was bound to give prompt notice to the defendant in error of its discovery that the pension checks in question were forgeries.
>
> 2. Said court erred in holding that a failure to give prompt notice of the discovery of said forgeries was a bar to recovery by the plaintiff in error of the moneys paid by it to the defendant upon said checks.

3. Said court erred in holding that there was an unreasonable delay on the part of plaintiff in error in giving notice to the defendant of the discovery of said forgeries.

4. Said court erred in holding that, in the absence of evidence that the delay in giving notice of said forgeries to the defendant worked damage to said defendant, the plaintiff was not entitled to recover the moneys paid to the defendant upon said forged checks.

5. Said court erred in holding that said pension checks were to be considered in all respects as though they were commercial paper, and that the rules governing notice in the case of commercial paper should apply to said pension checks.

6. Said court should have held that the plaintiff in error was not liable to the imputation of laches because of any negligence on the part of its officers in giving notice to the defendant after the discovery of said forgeries.

7. Said court should have held that as it did not appear that the delay in giving notice of the forgeries to the defendant caused the latter any damage, that plaintiff in error was entitled to recover the moneys paid by it to the defendant upon said forged checks.

8. Said court should have held that said pension checks are not commercial paper, and that the rules governing notice of forgeries of commercial paper do not apply to them.

9. Said court erred in reversing the judgment of the Circuit Court and remanding the case to that court with directions to enter judgment for the defendant there.

ARGUMENT.

The only question considered in the Circuit Court was, whether or not plaintiff's right of recovery was defeated by its failure to give notice to the defendant of the forgeries of the indorsements upon said checks *immediately* upon their discovery; and upon this point the court held that plaintiff's right of action was not defeated by such failure, inasmuch as the defendant had in no respect been damaged by such delay. (Opinion, Rec., pp. 22 and 23.)

The Circuit Court of Appeals took an opposite view of this question, and held that plaintiff's right of action was defeated by its neglect to give notice to defendant *immediately* upon the discovery of the forgeries; and that court also considered the further questions as to whether or not pension checks are commercial paper in the strict sense of that term; and whether or not the Government could be charged with the laches or negligence of its agents in failing to give the necessary notice. The court resolved these questions also in favor of the defendant (Record, pp. 36–42), Judge Aldrich, however, filing a dissenting opinion upon all the points considered. (Record, pp. 42–46.)

We will discuss these three propositions in the order mentioned:

## I.

**Is the Government's right of action defeated by the failure of its agents to give notice to defendant of the forg indorsements immediately upon the discovery there**

It is not insisted that plaintiff is barred by the failure to make an earlier discovery of the forgeries, or because the suit was not brought sooner after the forgeries were discovered and notice of same given to defendant, but the Circuit Court of Appeals was of the opinion that the right of action was lost because of the fact that *notice* of the forgeries was not given defendant *immediately* after their discovery, although there was no evidence of a change of conditions between their discovery and the time notice was given whereby defendant suffered any damage.

The authorities directly in point on this question are astonishingly meager, but we insist that the rule adopted by the Circuit Court of Appeals is not in accord with sound reasoning or with the weight of the authorities.

There are cases in which the language of the courts implies that notice should be given immediately upon the discovery of the forgery, but such expressions are ordinarily *dicta,* and in none of those cases does it appear that the point was considered with any degree of care. However, as this appears to have been the only question in this case considered in the Circuit Court, and the principal one considered in the Circuit Court of Appeals, the point has been more carefully looked into in the

present case by the learned judges who have heretofore had it before them than perhaps in any other reported case, and the result has been that two of those judges take one view of the question, while the other two entertain an opposing view.

The view that notice of the forgery must be given immediately upon its discovery undoubtedly arises out of some kind of supposed analogy between such notice and the notice of dishonor required in case of nonacceptance or nonpayment of a note, draft, or check, it being entirely overlooked that there is no substantial analogy between the two conditions, and that the reason for the rule in the one case does not exist at all in the other case. The theory upon which the notice of dishonor is required is thus expressed in 2 Daniel on Negotiable Instruments, section 970:

> It is regarded as entering *as a condition in the contract* of the drawer and indorser of a bill, and of the indorser of a note, that he shall only be bound in the event that acceptance or payment is only demanded, and he notified if it is not made. And in default of notice of nonacceptance or nonpayment, the party entitled to notice is at once discharged, unless some excuse exist which exonerates the holder.

It being a part of the contract that notice of dishonor shall be given indorsers before they can be held liable, such notice is therefore a part of the plaintiff's case (2 Daniel on Neg. Inst., sec. 971); and the fact that such notice has been given must

be averred in the plaintiff's declaration, either specifically or in general terms, or otherwise it will be fatally defective. (8 Cyc. Law and Proced., 126.) This is not true with reference to notice of a forged indorsement by the party paying the check. Such fact constitutes no part of the right of action, but the question of notice and the effect upon the defendant of delay in giving the same is solely a matter of defense. It was properly said by Judge Aldrich in his dissenting opinion, that—

> The moment the United States had paid the Providence bank money through mistake upon pension checks bearing forged indorsements there was created in its behalf by operation of law the right to recover it back. The question is, therefore, whether the United States has lost the right * * *. If the Government, therefore, has lost its right of recovery, a right which at one time existed, the loss of the right came by reason of negligence or laches resting in the failure to give notice. So it is not a case where diligence is an element of the plaintiff's case in establishing his right, because the right of recovery resulted by operation of law from the fact that the payments were made upon forged indorsements through mistake, and thus it follows, as it seems to me, that the negligence comes into the case as an element of the defense rather than as a necessary element in the plaintiff's case. Delay being a matter of defense, it is difficult to see why it should operate to bar recovery unless the

party receiving the money on forged indorsements has been damaged by the delay. (Record, p. 42.)

Since the question presents one purely of defense and not one going to plaintiff's original right of action, there is no reason why the circumstances in this case, or in any other similar case, should present any exception to the general rule that before negligence can create a cause of action, or can defeat a right of action already existing, some damage must result to the party relying upon the acts of negligence; and the further rule that he who relies upon negligence as a ground of recovery, or to defeat a right of recovery, has the burden of proving, not only the negligence, but the damage resulting therefrom.

This is especially true in view of the fact that forgery is something which is not contemplated in negotiating commercial paper, and consequently can not, by implication, enter into the contracts between various parties handling such paper.

The following authorities are in accord with the view above suggested:

In *United States* v. *National Park Bank* (6 Fed. Rep., 852) this precise question was considered by Judge Choate. That was an action to recover $100 paid by the assistant treasurer in New York on a draft drawn upon him for bounty, upon which there was a forged indorsement of the party in whose favor it was drawn. The payment was made in 1869. It was claimed that the forgery was discov-

ered in February, 1879, and that no information thereof was communicated to the defendant until February, 1880. Upon this question the learned judge said (p. 853):

> It is not alleged in the answer, nor is there any proof, that the defendant has suffered any loss or damage by reason of this delay or lost any remedy over against the party from whom it received the draft and to whom it paid the money. But it is contended that such delay is itself negligence of such a character that loss or damage will be presumed to have resulted from it. I think this point is not sustained, either by authority or the reason of the thing. Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration and can not equitably be retained. The rule is equitable and may be defeated, where to allow the recovery would be inequitable. Negligence in the transaction, unattended with any loss or harm resulting from such negligence to the other party, surely does not impair the equity of the claim against him. Such negligence does not touch the reason of the rule allowing the recovery. If that negligence consists in delay in making the reclamation, with what justice can the party to whom the payment was made say that though he received the money under a mistake of fact and was bound to return it a year ago, and could not equitably or justly keep it then, because it did not belong to him; yet, now that the

> party paying has neglected to let him know of his claim after discovery of the mistake, he can justly and properly keep it? This would be absurd. The authorities are to this effect: That negligence in giving information of the mistake to the other party, with resulting loss of remedy over, is a defense, but otherwise not. The doctrine rests on the duty which the party paying owes to the other to shield him, as far as possible, from loss or damage resulting from the mistake when he discovers that it is such. If the failure to perform that duty results in loss or damage to the other party, then it is inequitable that he should be obliged to refund. But if that negligence has made no difference to him, then it is immaterial.

The same view is expressed by the Supreme Court of the District of Columbia in *United States* v. *Bank* (13 D. C. Rep., 296).

In *United States* v. *Onondaga County Savings Bank* (39 Fed. Rep., 259) the facts were that on July 25, 1882, a pension certificate was issued to Alma Wood; on August 3rd false vouchers were presented to the pension agent at Syracuse, and on the same day that agent drew two drafts for $1,000 and $924.80, respectively, upon the assistant treasurer of the United States, payable to the order of Alma Wood, and mailed them to her address. She, however, had died on July 8, 1882, and on the 8th day of August her name was forged to these drafts, and upon this indorsement the defendant bank cashed the checks, and on the following day col-

lected the amount thereof from the subtreasury. In the spring of 1884 the forgery was discovered, and in three days thereafter demand was made for a return of the money. Both the Circuit Court and the Circuit Court of Appeals for the Second Circuit (64 Fed. Rep., 703), held that the Government was entitled to recover. It is true that the question of delay in giving notice *after the discovery* of the forgery was not specially raised and considered, the principal defenses being that the Government was negligent in issuing the drafts after the pensioner's death, and that its agents were negligent in discovering the forgery, and that it had no right of recovery because it had refused to surrender the drafts which were necessary to enable defendant to collect from those responsible for the forgery; yet the conclusion reached by the court and its reasoning in support thereof is authority for the contention that the ordinary rules of negligence are applicable in this character of cases. And the statement of the Circuit Court of Appeals (64 Fed. Rep., 705) that "the proof shows that the bank was notified some three days after the forgery was discovered, which was certainly a reasonably prompt notice," indicates that the rule requiring *immediate* notice in case of dishonor of commercial paper does not apply to this character of case; otherwise, it would have been necessary to have given the bank notice *on the very day of discovery.* If such a rule does not apply, then what difference can there be between a delay of three days and three months,

provided the parties remain in the same condition?

When it is conceded that notice does not have to be given upon the day of discovery, then it becomes a question of what is reasonable diligence in giving notice; and ordinarily no delay is regarded as vital unless it has had the effect of placing the opposite party in a worse condition.

The holding of this court in *Cooke et al.* v. *United States* (91 U. S., 389, 402–403) is to the same effect. That was an action by the United States to recover money paid Cooke & Co. by the assistant treasurer at New York for the purchase or redemption before maturity of what purported to be eighteen 7–30 Treasury notes, but which, it was alleged, were counterfeit. Upon the question of the return of those notes to Cooke & Co., the court said:

> Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant treasurer, as will throw the burden of the loss upon the Government. The return should have been made within a reasonable time; and what is a reasonable time is always a question for the courts when the facts are not disputed. (*Wiggins* v. *Burkham,* 10 Wall., 133.) Here there is no dispute. The notes were delivered to the assistant treasurer on different days between September 20 and October 8. The first suspicion in Washington in regard to their character was October 5, when a note was found, of which, upon inspection of the record, a duplicate was al-

> ready in. All the notes were found and returned to New York October 12, and the next day Cooke & Co. were notified.

It appears, therefore, that in this case there was a delay of about eight days after the discovery that the notes were counterfeit. Therefore this court does not apply the same rule in requiring notice of the discovery of a forgery that is applied to notice in case of dishonor of commercial paper.

Cases can be easily conceived wherein a delay of eight days in giving notice would be fatal, and in which the court should hold that the plaintiff's right of recovery had been barred, but the plaintiff would be defeated, not by the mere delay in giving notice, *but by the fact that the defendant had been damaged by the delay.* It is the damage to the defendant that constitutes the material defense; but as long as the element of damage is absent we insist that the mere matter of delay can not affect the plaintiff's right of recovery.

In accordance with this contention, the following is quoted from the text of 5 Cyc. Law and Procedure, pages 546, 547:

> Although money paid by mistake can generally be recovered, the payment of forged paper is an exception. When payment is made to the holder of paper who has come into possession of it without any fault on his part, *and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money can not be recovered from him.*

*In giving notice of forgery after its discovery there must be reasonable diligence, but mere lapse of time, however long, between the time of payment and notice of the forgery will not deprive the payor of his right to recover of the payee.*

There can be no difference in principle, so far as the mere matter of delay is concerned, between a delay before discovery and a delay after discovery of the forgery; and yet, in all the cases, it is conceded that any length of delay in discovering that the indorsement is a forgery can not bar the plaintiff's right of action. In either instance the delay may be fatal to the other party, but in order to defeat a right of action there must concur the injury to the defendant and the negligence upon the part of the plaintiff. In case of delay before discovery the injury may result, but there is no concurrent negligence; while in the case of delay after discovery of the forgery there may be negligence, but if there is no concurrent injury to the defendant the payor's right of recovery can not be affected.

In *White et al.* v. *Continental National Bank* (64 N. Y., 316, 321, 322) the action was brought to recover money paid by plaintiffs to defendant upon a draft which had been raised from $27 to $2,750. The forgery was discovered about two months after the money was paid and defendant was at once notified. Upon the question of plaintiff's negligence in discovering the forgery the court said:

> It follows that there could be no negligence on the part of the plaintiffs which could de-

> feat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation there was no estoppel to bar the action.

A comparison was drawn between the facts in that case and those of the case of *Continental National Bank* v. *National Bank of the Commonwealth* (50 N. Y., 575), wherein the officer of the bank pronounced a forged certification of a check to be genuine, upon which the payee of the check relied, and this was held to be an estoppel; and wherein if the teller of the certifying bank had disclaimed the forged certification and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the bank of the State of New York before he received the money on the gold checks and before he went to the subtreasury with the gold certificates; and upon the question of estoppel the court said:

> In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant or those from whom it received the bill could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. *Estoppels can not be based upon mere conjectures, even if a proper foundation is laid for them in other respects.*

This case, like the other authorities above cited, shows that in questions arising out of forgery the rights of the parties are to be determined by the principle of estoppel, and that inasmuch as an estoppel can not arise unless damage has resulted through the other party's conduct, a right of action in a case of this character is not barred by mere delay in giving notice.

As above stated, it is not insisted that plaintiff's action is barred by its delay in bringing its suit after the discovery of the forgery, and yet there would be as much reason in contending that plaintiff is estopped by its failure to bring suit immediately to recover the amount due from defendant as by insisting that it is estopped by delay alone in giving notice, since no damage resulted to the defendant by the delay, either in giving notice or in bringing suit; but if any damage had resulted as a consequence of neglect in either respect, the condition of the parties would have been different and the principle of estoppel would apply.

Mr. Daniel is also of the opinion that in case of forged indorsements the doctrine that the demand for restitution may be made within a reasonable time after the forgery is discovered, and that the mere length of time is not important is the wiser and juster rule. (2 Dan. Neg. In., sec. 1372.)

Defendant relies on the case of *United States* v. *Clinton National Bank* (28 Fed. Rep., 357), which was decided by Mr. Justice Brewer while circuit

judge. The facts in that case were that Rucker, a paymaster in the United States Army, drew a check on the assistant treasurer of the United States at New York for $100 bounty money, payable to the order of one Thrall. On October 26, 1868, the defendant bank presented this check to the assistant treasurer and received the money thereon. It was afterwards ascertained that the indorsement of Thrall upon the check was a forgery. On October 9, 1880, nearly twelve years thereafter, action was brought by the Government to recover the money paid on the forged indorsement. The defendant in its answer pleaded negligence and laches on the part of the Government, in that it was informed by the payee Thrall of the fact that his indorsement was forged soon after the payment of the check, and before the end of the year 1868, and that it never notified the defendant or any one else interested in the transaction *until about ten years thereafter and until the defendant had lost all opportunity to protect itself*. To this defense the plaintiff demurred. The court overruled the demurrer, and the plaintiff standing on the demurrer, judgment was entered in favor of the defendant.

It is not insisted by the Government in this case that if the defendant had lost the opportunity to protect itself on account of the delay in giving notice its defense would not be complete.

## II.

**Were the pension checks in question commercial paper in the strict sense of that term?**

We insist that they were not, and that they fall within the rule laid down in the following authorities:

In *The Mayor* v. *Ray* (19 Wall., 468, 477) the question was whether the following instrument was commercial paper, to wit:

> No. 3521. $1000.
>
> Nashville, December 23, 1868.
>
> Treasurer of the Corporation of Nashville, pay to A. J. Duncan, or bearer, one thousand dollars on account of water work.
>
> A. E. Alden, Mayor. W. Mills, Recorder.
>
> (Endorsed:)
>
> Thomas G. Magrane, Treasurer.
>
> December 26, 1868.

It was held by this court that it was not a negotiable instrument. Upon this question the court said:

> Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due public creditors are of course necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes. But to invest such documents with the character

and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied. * * * But every holder of a city order or certificate knows that to be valid and genuine at all it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts can not create an estoppel against the city itself, its taxpayers, or people. Persons receiving it from them know whether it is issued, and whether they receive it for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients, and all subsequent holders take *cum onere* and are affected by the same defect.

This rule was followed in *Wall* v. *County of Monroe,* 103 U. S., 74, 78; *Claiborne County* v. *Brooks,* 111 U. S., 400, 408; *District of Columbia* v. *Cornell,* 130 U. S., 655, 661. In each of these cases the instrument in question was in form a negotiable instrument, but they were held to be not negotiable for the reasons given in the above quotation from *The Mayor* v. *Ray.*

It is apparent that these reasons apply with equal force in the present case. Every one who accepts a pension check and pays the money therefor does so with the knowledge that they are being issued by the tens of thousands every year; that it is practically impossible for the authorities to keep track of every pensioner and to know for a certainty whether or not he or she is still alive; that the authority of the pension agents is expressly restricted by statute, and a check issued upon forged vouchers is an absolute nullity, because in such case the agent is wholly without authority to issue the same. Furthermore, a check of this character is not issued by the Government as a part of a business transaction, there being no consideration in a legal sense for the check. In this respect it is to be distinguished from those cases where a draft has been drawn in payment for services and has been accepted by an assistant treasurer or by some officer of the Government. Upon this question the *Floyd Acceptances case* (7 Wall., 666, 676) has a material bearing. In that case drafts were drawn on Hon. J. B. Floyd, Secretary of War, by certain con-

tractors, and said Floyd, as such Secretary, undertook to accept the same, and upon the faith of his acceptance they were negotiated. It was held by the court that they were not negotiable paper, but were totally void, inasmuch as the Secretary of War was without authority to make such an acceptance, the court saying:

> Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.

It is conceded, and there are no authorities to the contrary, that if the pension checks in question in this case were not strictly commercial paper, then the rule that it is necessary to give notice immediately upon the discovery that the indorsements were forgeries does not apply.

## III.

**Can the Government be bound by the laches of its officers in failing to give notice within proper time that the indorsements on the checks in question were forgeries?**

It is true that in *Cooke* v. *United States* (*supra*) it was held that, when the Government becomes a party to a negotiable instrument, it is bound to take the same steps to perfect its rights as is an ordinary individual. This rule, of course,

does not apply in case the checks in question are not negotiable instruments. Furthermore, we insist that it should not be applied here, even if it be held that the checks are negotiable instruments, because, as heretofore shown, the Government's right of action does not depend upon the giving of notice to the defendant. If such notice were a necessary prerequisite to the bringing of the action, as is the fact of giving notice of the dishonor of commercial paper, then undoubtedly the rule laid down in *Cooke* v. *United States* is a proper one. But where plaintiff's right of action exists, and the neglect to give notice can only be set up as a matter of defense, then it presents precisely the same question as any other act of negligence upon the part of the Government's officials; and there is no more reason why its right of action in a case of this kind should be barred by failure of its agent to give notice, than why its right of action on an official bond should be barred by the neglect of its officials to take action against the sureties in proper time.

It is insisted, therefore, that the judgment of the Circuit Court of Appeals should be reversed, and that judgment should be here entered for the plaintiff against the defendant for the amount for which judgment was rendered by the Circuit Court, with interest thereon to date.

J. A. FOWLER,
*Assistant Attorney-General.*

DECEMBER, 1908.

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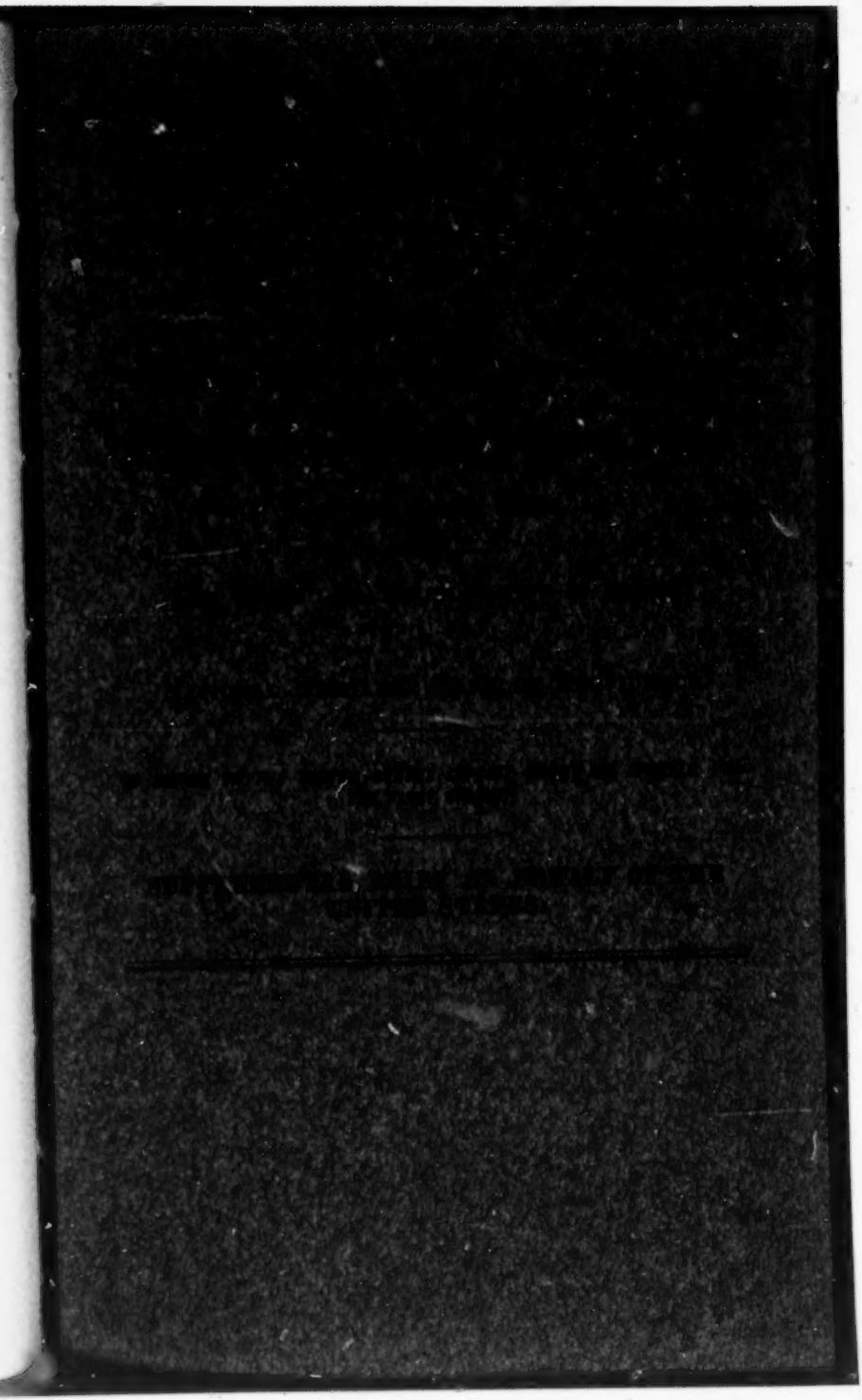

# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN error,
*v.*
NATIONAL EXCHANGE BANK OF Providence.
} No. 90.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.*

## SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

It is first insisted that it was necessary for the United States to have given notice of the forgery within a reasonable time after the payment of the checks.

In our former brief it was assumed that there was no insistence that the plaintiff was deprived of its right of recovery by the lapse of time from the payment of the checks to the discovery of the forgery. This assumption was based upon the fact that there is nothing in the record to indicate that it was insisted to the contrary in the court below; and upon the state-

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ment by the court, in the opinion of the majority, of the question involved, in the following language:

> It is to be noted that this case does not involve the rule, which arises out of payments by a bank of checks drawn upon itself bearing an apparent but forged signature of one of its customers. It relates only to the demand for the repayment of money paid on account of forged or false indorsements of signatures of individuals whose signatures the United States were not bound to know, as a bank is bound to know those of its customers. It is also to be noted that there is no suggestion made before us that either the bank in question here or the United States have been guilty of negligence except in the particular to which our attention has been brought, namely, an unreasonable delay on the part of the United States in giving notice of the discovery of the false signatures or forgeries.

But inasmuch as this question is raised by defendant in error we submit that it is contrary to the great weight of authority, as shown by the cases cited under both this and subsequent heads in defendant in error's brief. We do not, in fact, understand that the English authorities support the contention that it is necessary to give notice of the forgery within a reasonable time after payment, when the forgery consists of a forged indorsement.

In *Cocks* v. *Masterman* (9 B. and C., 902), which is cited as laying down the English rule upon this

question, the action was brought by a bank to recover money paid another bank upon a forged acceptance by a depositor of the plaintiff bank. It appeared that the bill was paid by the plaintiff the day upon which it became due, with the three days of grace added, but the plaintiff did not present the same to the acceptor whose name was forged and who was a client of the bank until the following day, and consequently notice of its dishonor was not given upon the day of payment. Recovery was disallowed upon the specific ground that it was necessary that notice of dishonor be given upon the day of payment in order that other indorsers might be held, and such notice not having been given such indorsers were thereby released. This, of course, was an early statement of the general rule which has ever since been recognized as the law relating to commercial paper, but has no application to the facts in this case.

In the case of *United States* v. *Cooke* (Fed. Cases, No. 14855) the facts were that the name of Charles M. Colton, assistant surgeon, U. S. Army, was forged to an order drawn upon a paymaster of the United States Army, and the order was cashed by McVay & Co., who sent it to the defendant, Cooke & Co., by whom the money was collected from the paymaster. This occurred in June, 1863, and the forgery was not discovered until 1869; and in November, 1869, action was brought to recover the amount paid, it not appearing that any previous notice had been given. The court stated to the jury that the case did not

differ from the familiar one where an individual paid a check on the faith of the signature of the drawer, and directed a verdict for the defendant. Upon a motion for a new trial, the court said that the delay of more than six years which had elapsed was fatal to the claim of the United States, and that all the cases require the utmost diligence on the part of the drawee, a diligence analogous to that required in giving notice of the dishonor of commercial paper.

It was, of course, the duty of the Government to know the signature of the drawer of that paper, while it was not required to know the signatures of the indorsers of the numerous checks in question in the present case; and it is well recognized in the authorities that there is a broad distinction between the rights of the payee when the drawer's name to a negotiable instrument is forged and his rights when the name of an indorser thereon is forged. However, if the general remark made by the court be considered as sustaining defendant in error's contention that the time which elapsed between the payment of the money and the discovery of the forgery may create a bar to recovery, it is entitled to but little weight when considered in the light of the numerous authorities to the contrary.

This question, as will be shown under the next head, was not involved in the case of *United States Bank* v. *Bank of Georgia* (10 Wheat., 333).

## II.

We will briefly consider some of the authorities cited to sustain the contention that it was necessary for plaintiff to have given immediate notice of the forgery when the same was discovered.

Defendant states the proposition that it was necessary to give notice within a *reasonable time* after the discovery of the forgery; but manifestly its theory is that notice within a reasonable time means immediate notice, for otherwise, as stated and insisted upon in our former brief, it would be necessary for the court to take into consideration all the facts and circumstances and determine therefrom whether or not any injury to the defendant did, as a matter of fact, result in consequence of the delay in giving the notice; and there would be no general rule as to what constitutes a reasonable notice, but every case would have to be determined upon the particular facts involved therein.

As above stated, the case of *United States Bank* v. *Bank of Georgia* (10 Wheat., 333) has but little or no bearing upon the principle presented for decision in the present case. In that case the Bank of Georgia had issued the bank notes in question, and while in course of circulation they were fraudulently altered, and having found their way into the Bank of the United States, it presented them to the Bank of Georgia, who received them as genuine and credited them to the general account of the Bank of the United States as cash by way of deposit. It was held by the

court that the Bank of Georgia was bound to know its own paper and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions, and that its acceptance of this paper estopped it from subsequently insisting that it was not genuine. Immediately preceding that part of the decision quoted in the majority opinion in the court below, and also in defendant's brief, the court said:

> And in respect to persons equally innocent, where one is bound to know and act upon his knowledge and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in the payment of such notes, which its own acts have deliberately assumed to be genuine (p. 343).

And it was to emphasize this principle, when applied to the facts in that case, that the remarks quoted were made.

In *United States* v. *Central National Bank* (6 Fed., 134) the action was brought to recover $100 and interest, which had been paid to the defendant upon a draft drawn March 24, 1868, upon the assistant treasurer of the United States by C. Holmes, paymaster, U. S. Army. The name of the payee, James Barr, had been forged thereon. This forgery was not discovered until July 26, 1879, and on July 31,

1879, without any notice of the forgery having previously been given, action was brought. It was held by Butler, district judge, that the United States could not recover because its failure to give notice and make claim on the defendant amounted to such negligence as would bar a recovery.

This case, like the case of *United States* v. *Cook* (Fed. cases, 14855), rests entirely upon the assumption that it was the duty of the United States to ascertain the fact of the forgery within a reasonable time, but inasmuch as the United States was not required to know the signature of the indorser and no duty therefore rested upon it to exercise any care in ascertaining whether or not the indorsement was a forgery, under the very great weight of authority no negligence can be imputed to it for its failure to do so, and we submit that no weight should be attached to this decision.

In *United States* v. *National Exchange Bank* (45 Fed., 163) the facts were that through a number of letters forged by one Schuman, the father of one Anton Erben was induced to remit by money orders a considerable sum of money to said Erben in care of the German Aid Society, Milwaukee. By further misrepresentations upon the part of Schuman, he obtained possession of the orders and procured one Reuter, who was connected with the aid society, to identify him at the bank as being Erben. Thereupon the bank paid the order upon the indorsement of said Erben forged by Schuman. Some time

afterwards Schuman's fraudulent scheme and his forgery of Erben's name was discovered, and the money was paid Erben by the Post-Office Department, and suit was brought by the United States to recover the sum from the bank.

The case was decided principally upon the ground that, while the order was issued in the name of Anton Erben, it was really issued to Schuman, and that the bank made proper inquiry with reference to whether the person presenting the order was the owner thereof, and therefore was protected by the principle that "Where both are innocent and the loss must fall upon one, it should be upon the one who, in law, most essentially facilitated the fraud," and "Where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with loss in exoneration of the former, or if both are equally innocent and equally ignorant the loss should remain where the chance of business has placed it."

However, it was mentioned, without any extended consideration, that the delay of the Government to give notice for more than a month after the forgery had been ascertained, of its intention to hold the bank liable, was sufficient to defeat its recovery.

In *Gloucester Bank* v. *Salem Bank* (17 Mass., 33) the facts were that the Salem bank held a number of notes which appeared to have been executed by the Gloucester bank. Upon notice given, the Gloucester bank paid said notes, and held them for more than a

month without making any examination to ascertain whether or not they were genuine. The gist of the court's opinion in dismissing the action brought by the Gloucester bank against the Salem bank to recover the amount of the forged notes is contained in the following sentence:

> There was an actual adoption of them by the Gloucester bank as their own notes, through their cashier, who, acting in the course of business intrusted to him, of which paying and receiving notes is a principal part, must be considered as representing the bank in this transaction.

In the case of *Raymond* v. *Baar* (13 Sergeant and Rawles, 318) the plaintiff had received from the defendant a counterfeit $10 note, and held the same for six months. The court below charged the jury that if the defendant had no knowledge that the note was counterfeit the plaintiff was precluded from recovering by holding the note for an unreasonable time without demand on the defendant. It was held by the Supreme Court of Pennsylvania that there was no error in this charge.

The court, among other things, said:

> But in consequence of the plaintiff retaining it (the counterfeit note) so long he has lost all chance of redress, because it would be extremely difficult after the lapse of six months to identify the note or prove from whom it was received.

We insist that the reasons why due diligence should be exercised in giving notice upon the receipt of a counterfeit note do not apply to the present case.

The note by Justice Holmes, found in 3 Kent, 85, to wit,

> The acceptor is held to be at liberty to show a forgery in the body of the paper, and if he has paid the forged amount may recover it back from the person to whom he has paid it, provided he has been guilty of no negligence in failing to detect the forgery and has given notice of the forgery as soon as discovered,

is also cited as authority sustaining defendant's contention. We insist that this note, like the language used in a number of decisions cited by counsel, only emphasizes the fact that money may be recovered when paid upon a forged note, but can not be taken as an authority for the contention that immediate notice must be given upon the discovery of the forgery. It will be observed that it is here stated that recovery may be had in case due diligence is used to ascertain the forgery and notice of the forgery is given when discovered, but it is not said that recovery *will be denied should such notice not be given*, nor do we understand that it was so held in the authorities cited in support of the note above quoted. In fact dependant's contention rests very largely upon authorities which undertake to say that under certain circumstances money paid on forged paper *may* be recovered, but do not lay down a rule as to when money so paid can *not* be recovered.

## III.

If the burden rests upon the plaintiff to show that defendant was not placed in a worse position in consequence of its failure to give immediate notice of the discovery of the forgery, which we deny, it clearly appears from the facts that the defendant suffered no injury whatever in consequence of the delay.

It is suggested that although the forger, Munson, was insolvent, yet a criminal prosecution might have induced him or his friends to raise all or a portion of the money paid out by defendant, but, as stated upon page 3 of defendant's brief, Munson was sentenced on June 22, 1898, to imprisonment for the term of five years for these forgeries. This was but a month after some of the forgeries had been detected; and it appears therefore that very prompt action was brought against Munson, and that if any part of the money lost could have been by this means wrung from him or his friends, it would have been done.

It is certain, under this record, that the defendant bank suffered no damage whatever and was not injured in the least in consequence of the delay of from two to five months in giving it notice of the various forgeries in question.

It is insisted that if the checks in question are not negotiable instruments in the strict sense of that term, yet the same rule applies with reference to

requiring notice in case of payment on a forged indorsement.

We insist that the authorities cited upon this point do not sustain counsel's contention. In the case of *Wall* v. *County of Monroe* (103 U. S., 74), which is cited in support of this proposition, the court held that county warrants—

> being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee.

To the same effect see *Watson* v. *City of Huron* (97 Fed., 449).

Furthermore, it was conceded, in the opinion of the majority in the court below, that the principle that immediate notice was necessary would not apply in case the checks in question were not strictly negotiable instruments. They, in fact, would be controlled by the same principles that apply to a claim for damages or to any personal chattel.

V.

We wish to emphasize the point presented in our former brief—that even though an ordinary individual would be barred from recovery in consequence of the

failure to give immediate notice upon the discovery of the forgery, yet this principle can not apply to the Government.

As we understand, practically all authorities agree that the bar is created by the negligence of the party who pays the money upon the forged indorsement. As pointed out in said brief, this principle is entirely distinct from the principle which requires notice of nonpayment or dishonor of a check, draft or note, to be given upon the day of such dishonor; such notice being in that case a part of the contract between the various parties, and therefore an essential prerequisite of the right of action. In such a case the Government would necessarily be bound as any other individual; but we respectfully submit that negligence can not be imputed to the Government, and that therefore a right of action which otherwise exists in the Government can not be defeated by a mere act of negligence upon the part of one of its officers.

J. A. FOWLER,
*Assistant Attorney-General.*

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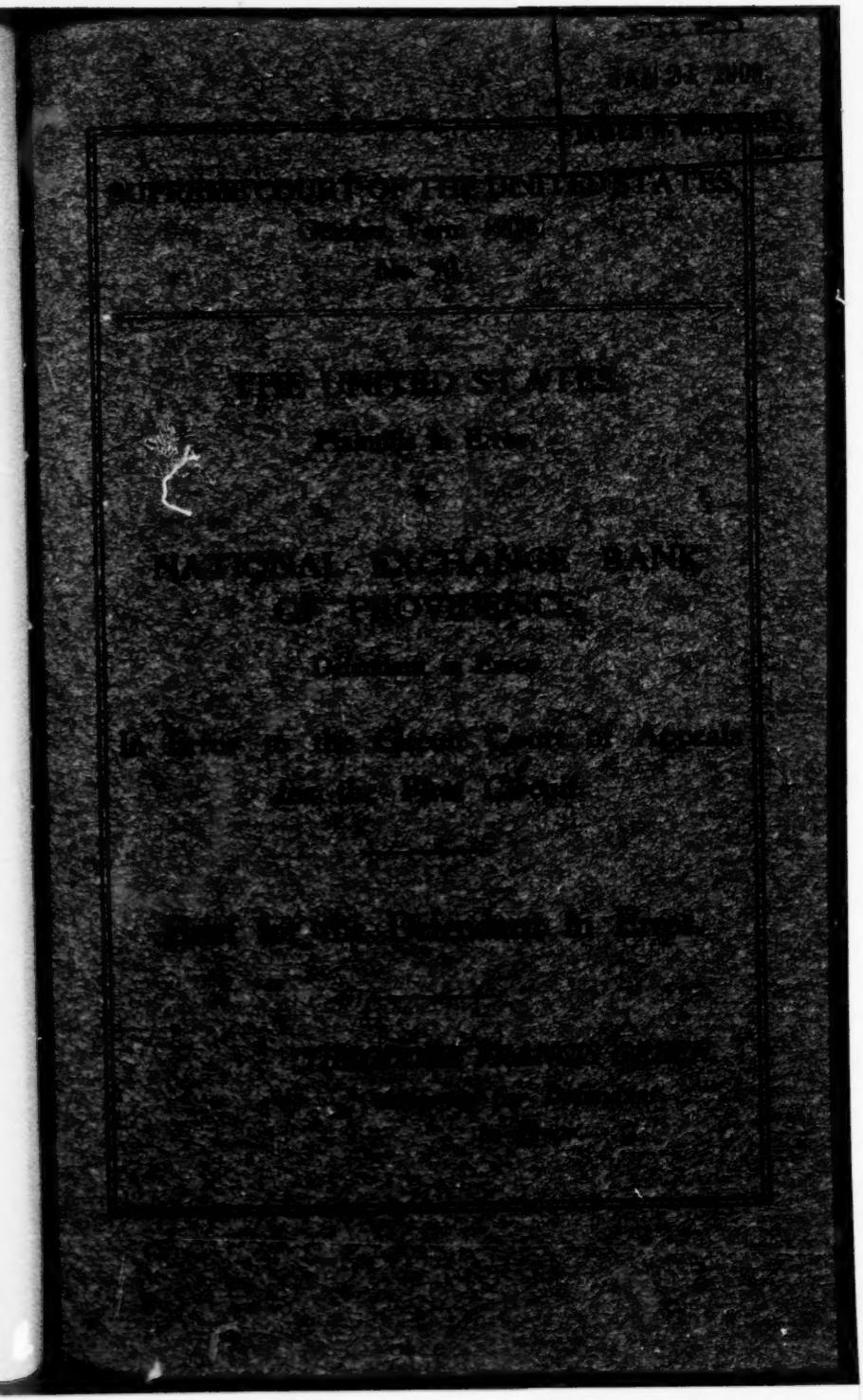

SUPREME COURT OF THE UNITED STATES

October Term 1908.

No. 90.

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THE UNITED STATES,

Plaintiffs in Error,

*v.*

NATIONAL EXCHANGE BANK OF PROVIDENCE,

Defendant in Error.

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# Brief for the Defendant in Error.

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## STATEMENT OF CASE.

This is an action at law, brought in the Circuit Court for the District of Massachusetts by the United States against the National Exchange Bank of Providence. Jury trial in that court was waived, and the case was tried on an agreed statement of facts.*

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* The National Exchange Bank of Boston was originally the defendant (Record, p. 4). The writ was amended by agreement by substituting the National Exchange Bank of Providence for the National Ex-

The purpose of the suit was to recover back money paid by the plaintiffs to the defendant upon a large number of pension checks bearing forged indorsements. By the agreed statement it appears that the checks were issued quarterly by the United States pension agent at Boston, from 1886 to 1897, both inclusive. Some of the persons to whose order the checks were drawn were at the time dead; others were remarried widows not entitled to a pension. One Munson became possessed of the checks upon their issue and forged thereon the indorsements of the respective payees. They were all cashed in good faith by the defendant in error, which was also the original defendant herein; but the precise circumstances under which they were cashed does not appear. The checks were forwarded to a Boston bank for collection and all paid in regular course at the Sub-Treasury in Boston. On June 18, 1897, the special examiner of the Pension Bureau reported to the Bureau that the indorsements of three of the checks in suit, drawn payable to Leonard J. A. Mooy, were probably forged by Munson. On December 18, 1897, notice of these forgeries was given to the defendant by the United States Attorney at Providence, and the defendant was informed that at a proper time reclamation would be made upon it. At

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change Bank of Boston (Record, p. 8). Judgment was entered by agreement for the National Exchange Bank of Boston (Record, p. 9), so that the case stands as if originally brought against the National Exchange Bank of Providence.

various dates between February 19 and May 28, 1898, the indorsements upon the other checks were discovered to be forgeries. On June 22, 1898, Munson was sentenced for the forgeries to imprisonment in the Rhode Island State Prison for the term of five years. He later died in prison, having made a deposition which is printed in the Record as a matter of reference, the making of which is admitted, but not the truth of the facts deposed. On July 22, 1898, the United States Attorney made demand upon the defendant for a return of the money paid on the latter checks except ten of those payable to Mary Shambell, and three of those payable to Susan A. Lake, with respect to which no notice was given prior to the beginning of this action. The defendant did not return the money received on the checks, and this suit was instituted August 27, 1901. (See Agreed Statement of Facts, Record p. 10).

The general form of each of the checks is shown by the following sample:

" UNITED STATES PENSION AGENCY, No. 297073
" BOSTON, MASS., March 5, 1892
" ASSISTANT TREASURER OF THE UNITED STATES

" *Boston, Mass.*
" *Pay to the order of Mahala B. Jacques* 9492 B81
" *Thirty-six* $\frac{00}{100}$ *Dollars* $36
" $36 Interior
" *W. H. Osborne*
" *U. S. Pension Agent.*

"Paid Mar. 12, 1892
"Asst. Treas., *Boston.*

"INDORSEMENTS:

"Mahala B. Jacques
"*Payee*
"M. M. Angell

"Pay Nat. Bank of the Republic, Boston or order, for collection, for account of First National Bank, Providence, R. I.
"C. E. LAPHAM,
"Cashier

"INDORSEMENT GUARANTEED
"Nat'l Bank of the Republic, Boston" (Record p. 36.)

On these facts the Circuit Court held that the plaintiffs might recover on all of the checks with interest from the date of the demand (Record pp. 15–16, 22).

In the Circuit Court of Appeals the decision of the Circuit Court was held to be error, on the ground that the regular rule requiring prompt notice to be given of the discovery of a forged indorsement of commercial paper in order to recover from one in good faith receiving money thereon applied in this case, and that the delay of the plaintiffs in giving such notice was unreasonable.

The judgment of the Circuit Court was accordingly reversed and the case ordered remanded with directions to enter judgment for the defendant (Record pp. 36–42).

The case is now before this Court on the plaintiffs'

petition for a writ of error to the Circuit Court of Appeals.

* * * * * * * *

Although the petition for the writ of error filed by the plaintiffs in error stated that the assignment of errors was filed therewith, it appears of record that although the writ issued May 10, 1907, no assignment of errors was filed until on or about October 23, 1908,—so near the time when the hearing was expected that it was found impracticable to change the form of the defendant's brief, which was then substantially ready for the printer. This may explain any change in the order of treatment between the plaintiffs' assignment of errors and the defendant's brief.

For the convenience of the Court reference is here made to the various headings in the brief under which the respective assignments of error are discussed.

| Assignment of error number | Brief for defendant in error |
|---|---|
| 1 | Part 1—I, II. (pp. 17, 19)<br>Part 2—I, II. (pp. 45, 53)<br>Part 3—I, II. (pp. 56, 58) |
| 2 | Part 1—I, II. (pp. 17, 19)<br>Part 2—I, II. (pp. 45, 53)<br>Part 3—I, II. (pp. 56, 58) |
| 3 | Part 1—III. (p. 35) |
| 4 | Part 1—IV, V. (pp. 38, 44) |
| 5 | Part 2—I, II. (pp. 45, 53) |
| 6 | Part 3—I, II. (pp. 56, 58) |
| 7 | Part 1—IV, V. (pp. 38, 44) |
| 8 | Part 2—I, II. (pp. 45, 53) |
| 9 | Brief as a whole. |

## ANALYSIS OF ARGUMENT.

The argument of the defendant may be summarized under the following heads:

### INTRODUCTION.

DISCUSSING MISCELLANEOUS CLAIMS HITHERTO MADE BY THE PLAINTIFFS.

1.— The bank is not concluded by the fact that it cashed the checks.

2.— The bank by presentment did not warrant genuineness.

3.— The hardship is not on the United States more than on the bank.

A.— MUTUAL MISTAKE IS NOT ALWAYS CONCLUSIVE.

B.— THE EQUITIES ARE EQUAL AND THE BANK HAS TITLE.

### CONSTRUCTIVE ARGUMENT.

### PART I.

I.— In case of payment under a forged indorsement of commercial paper, the plaintiff, in order to re-

cover, must have given notice of the forgery within a reasonable time after payment.

A.— AN UNREASONABLE TIME ELAPSED IN THIS CASE.

II.— In case of payment as above, the plaintiff, to recover, must at least have given notice of the forgery within a reasonable time after its discovery.

A.— AUTHORITIES REFUSING RECOVERY ON THIS GROUND CITED.

B.— AUTHORITIES ALLOWING RECOVERY WHERE PROMPT NOTICE GIVEN, DISTINGUISHED.

C.— AUTHORITIES CONTRA ANALYZED.

III.— The plaintiffs did not give the defendant notice of the forgery within a reasonable time after its discovery.

A.— UNDER GENERAL RULE.

B.— SPECIAL RULE UNDESIRABLE.

IV.— Proof of damage by the delay in giving notice is not necessary.

V.— If evidence of damage by delay is relevant, the burden of proof is on the *plaintiffs* to show absence of damage by the delay.

## PART II.

I.— Pension checks are commercial paper.

II.— If pension checks are not in every respect to be treated as commercial paper, they are to be so treated to the extent that the same rule requiring prompt notice should be applied.

## PART III.

I.— That the United States are parties plaintiff in this action is immaterial.

A.— As a party to such paper the United States stands in the position of any other litigant.

B.— The government may accordingly be bound by negligence of its agents in giving notice of the discovery of a forgery.

II.— The United States cannot properly claim that it was outside the domain of commerce so as to avoid the application of *Cooke* v. *United States*.

## ARGUMENT.

The decision of the Circuit Court of Appeals was not error.

## INTRODUCTION.

DISCUSSING MISCELLANEOUS CLAIMS HITHERTO MADE BY THE PLAINTIFFS.

Before presenting the real argument on behalf of the defendant, certain contentions which the plaintiffs made in the court of appeals, and which will probably be repeated here may properly be answered.

(1) The plaintiffs claimed that whatever otherwise might be the bank's rights, it is concluded by the fact that it made the first mistake in cashing the checks in suit.

In answer it should be noted, first, that so far as appears from the agreed statement of facts, the bank is not shown to have acted negligently in making the payments. (Record p. 11.) Nothing is set forth therein to show the circumstances under which the checks were cashed, and inasmuch as the bank, on the facts as set forth, may have acted with the utmost caution, the Court cannot presume that it acted without due care; indeed, the Court should rather presume that the transaction was conducted with the care usually exercised by banks under similar circumstances. It follows that those cases are not even in point in which the view has been taken that a negligent purchase of forged paper will render a bank liable to refund money received in retiring the same. And that the view itself is wrong, see

*Salt Springs Bank* v. *Syracuse Savings Institution*, 62 Barb. (N. Y.) 101,

where a bank cashed a forged check on a sister bank, which the latter honored. In a suit by the latter to recover the money, the Court say at p. 107:

> "It is not shown that the defendant is prohibited by a law of the State, or by its charter, from advancing the money on a check, for the accommodation of a stranger; and unless forbidden, it had the same right to take the check that an individual would have. The defendant owed the plaintiff no duty, imposed by custom or otherwise, to inquire into the genuineness of the check. It had the right to take the risk of advancing money upon it if it was forged, or if, for any other sufficient reason, the bank was justified in refusing to pay it. The plaintiff's counter was the proper place at which to ascertain whether the check was genuine."

It is to be noted secondly that the plaintiffs were not properly careful to prevent loss. They had on file authentic signatures of all the parties whose names were forged. (Record p. 10.) Yet, during periods ranging in the majority of instances from three to nine years they continued to cash checks bearing the forged indorsements of the respective pensioners. (Record pp. 18, 20.) The care actually used by the plaintiffs contrasts strongly with that required of others in the same connection — for the voucher sent out with each check required that the pensioner's signature "must be written

letter for letter as it is written in the pension certificate," that the magistrate taking the acknowledgment "must carefully compare this voucher with the pension certificate" and that the clerk of the court must certify that the magistrate's "signature within written is genuine." (Record pp. 10, 27, 28.) The facts which would have led to discovery of the forgeries were in the hands of the Government; and it cannot escape on the ground of lack of facilities for conducting an investigation, for the Revised Statutes provide that, "The Commissioner of Pensions is authorized to detail, from time to time, clerks in his office to investigate suspected attempts at fraud on the Government, through and by virtue of the provisions of the pension laws." R. S. Title LVII. § 4744. Under such circumstances if there is to be any contention as to either party's being concluded by mistake or carelessness there is rather ground for contending that by cashing the checks without objecting within a reasonable time, the Government negligently led the bank to believe the signatures genuiue, so that it could not question them in later transactions. Indeed such acquiescence might perhaps be held to prevent the United States from afterwards disputing their authenticity within the principle of,

> *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96, 112,

in which this Court in holding that a depositor could not recover money paid out by his bank on forgeries of

his name which would have been discovered if he had examined his returned checks with proper care, said, at p. 112,

> "Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth — which he has the means, by ordinary diligence, of ascertaining — and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct."

And see,

> *Howard & Preston* v. *Mississippi Bank*, 28 La. Ann. 727;

See also

> *Wood* v. *Carpenter*, 101 U. S. 135, 140,

holding that if one have the means of discovering a fraud in his power, he will be held to have known it.

(2) The plaintiffs also claimed that the presentment of the checks by the bank for payment implied a warranty of genuineness, and argued that such warranty lulled them into a false security.

There is some judicial sanction for the proposition of

law here involved, but so far as known, expressions countenancing it were not necessary to the decision of any case on which it is based. Mr. Daniel in his text-book goes so far as to say outright that a presenter for payment represents that he holds the bill of the drawer, and demands its acceptance or payment as such. A comprehensive and scholarly answer to his statement is that of James Barr Ames in 4 Harv. L. Rev. 301, who says,

> " One who transfers a bill or any chattel, whether by way of sale or in payment of a debt, does indeed represent that the thing sold or exchanged is his and also what it purports to be. To use the common expression, he impliedly warrants his title and the genuineness of the thing transferred. Accordingly, if it is not genuine, the vendee may recover his purchase money or the creditor may treat his debt as still unpaid. But the attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainor. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He in effect says, 'Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment.' . . . The so called indorsement is not an indorsement at all, but simply a receipt of payment."

The position of Dean Ames is sustained by the following cases:

*East India Co.* v. *Tritton*, 3 B. & C. 280, 289, 290, 291 (Bayley, J.).
*Wilkinson* v. *Johnson*, Ib. 428.
*Dedham National Bank* v. *Everett National Bank*, 177 Mass. 392.
*Bernheimer* v. *Marshall*, 2 Minn. 78, 84.
*Bank of St. Albans* v. *Farmers' Bank*, 10 Vt. 141, 145, 146.
STORY, PROMISSORY NOTES, 7 Ed. 526, n. 1.

And see

*Goetz* v. *Bank of Kansas City*, 119 U. S. 551, 555.
*Leather* v. *Simpson*, L. R. 11 Eq. Cas. 398.
*Corporation of Sheffield* v. *Barclay* (1903), 2 K. B. 580.

Such must also be the law under the numerous cases cited *infra* in which recovery was not allowed on account of delay in giving notice of the forgery. If there had been a warranty, the delay would have been irrelevant.

In connection with the above, attention should be given to the fact stated by Mr. Justice Putnam in the court below (Record p. 37), that "no indorsement by the Exchange Bank appears on the sample shown in the record, and whatever indorsement there is is simply 'for collection.'"

(3) Much was made in the Court of Appeals of the argument that the bank had the use, without interest,

of a large sum belonging to the Government for a long period, and that the bank is unjustly enriching itself by witholding the funds of the United States. Such an argument is obviously specious. The question to be determined is precisely whether the money *is* the money of the Government, and the defendant in error submits that on this point of the case the Court is to decide which of two innocent parties is to bear a loss, and not whether the bank must give up an unjust increase in its assets. To the argument of hardship on the Government, may be opposed that of exactly equal hardship on the bank if it must refund. The merit of the parties, for this purpose, is equal; technically put, they have equal equities; but the defendant has the legal title, i. e., to the money. The result of a judgment against the bank would be merely to shift—not to reduce or destroy the hardship.

The confident and sweeping assertion is made by the plaintiffs that it is a sufficient answer to the defendant's position to offer the general principle that "money paid under a mutual mistake of fact may be recovered." This assertion will be found, upon analysis, not to be adequate; unless the principle be stated fully by adding the qualification "if the retention of the money by the defendant is inequitable, i. e., unconscionable." An indefinite number of cases, all of unquestioned authority, might be cited to show that the mere circumstance that the plaintiff paid and the defendant received money under a material mistake of fact gives no absolute right to recover. Two or three instances will suffice.

(a) *Price* v. *Neal*, 3 Burr 1354.

Here a drawee paid an indorsee, both believing the draft genuine. In fact it was forged. Held: no recovery. This case is followed almost without exception throughout the United States, in England, and all over the continent of Europe. (See analysis by J. B. Ames in 4 Harv. L. Rev. 297.)

(b) *Hoffman & Company* v. *Bank of Milwaukee*, 12 Wall. (U. S.) 181.
*Goetz* v. *Bank of Kansas City*, 119 U. S. 551.

Here a drawee paid an indorsee, both believing that attached bills of lading were genuine. In fact they were forged. Held: no recovery.

On the same facts, in

*First National Bank of Detroit* v. *Burkham*, 32 Mich. 328,

Cooley, J., said, p. 331:

> "The best view that can be taken of this case for the plaintiffs below is, that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually when one of two parties equally innocent must suffer, the law leaves the loss where it has chanced to fall."

(c) *Merchants Insurance Co. of Providence* v. *Abbott*, 131 Mass. 397.

Here the insured fraudulently burned his building and assigned the insurance to the defendant, who collected the insurance in good faith from the plaintiff. Held: no recovery.

Nor does it matter whether defendant in taking his title gave his consideration to the plaintiff or to a third person, if he acted in good faith.

*Judson* v. *Corcoran*, 17 How. (U. S.) 612.

The case has been followed on the precise point involved in at least nine other cases in the federal courts.

## CONSTRUCTIVE ARGUMENT.

### I.

**In case of a payment under a forged indorsement of commercial paper, the plaintiff, in order to recover, must have given notice of the forgery within a reasonable time after payment.**

The above proposition of law is clearly the rule in England.

*Cocks* v. *Masterman*, 9 B. & C. 902 (1829).

The plaintiff, A's banker, paid the defendant a draft upon which A's acceptance was forged. The next day the forgery was discovered, and the same day the defendant was notified. The plaintiff was not allowed to recover, on the ground that the defendant was entitled to know on the due day whether the bill was a dishonored bill. The parties paying "ought not by their negligence to deprive the holder of any right or privilege" (p. 909).

*Accord*,

> *Mather* v. *Lord Maidstone*, 18 C. B. 273, 294.
> *Wilkinson* v. *Johnson*, 3 B. & C. 428 (*semble*).
> *Smith* v. *Mercer*, 6 Taunt. 76.

To the same effect in general, see

> *Bloomer* v. *Spittle*, L. R. 13 Eq. 427 (1872).
> 2 PARSONS, NOTES AND BILLS, 598.

In the United States Federal Courts also, a high degree of diligence has been required.

> *United States* v. *Cooke*, Fed. Cas. 14,855 (Dist. Ct., E. D. Pa., Cadwalader, J., 1871).

The court said,

> "It was only necessary to say that the delay of more than six years which had elapsed was fatal to the claim of the United States,—that all the cases

require the utmost diligence on the part of the drawee,—a diligence analagous to that required in giving notice of the dishonor of commercial paper."

*United States Bank* v. *Bank of Georgia.* 10 Wheat. (U. S.) 333.

The plaintiff for sixteen days negligently failed to discover the forgery of its president's name on its bills paid to it by the defendant, but gave notice immediately upon its discovery. In an elaborate opinion by Judge Story the delay was held fatal, and the payment was pronounced valid.

A.— AN UNREASONABLE TIME ELAPSED IN THIS CASE.

Within the rule of the above cases an unreasonable time elapsed between the payment of the checks in this case, and the notice to the defendant of the forgery. The period varied from eighteen months, in the case of the Mooy checks to over eleven years in one instance, and averaged from two to five or six years. (List of checks, Record, pp. 18, 20, Letters of district attorney, Record, pp. 11, 12.)

## II.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, to recover,

must have given notice of the forgery within a reasonable time after its discovery.

(A) — All of the cases cited under the last preceding heading apply also to this point. If notice of the forgery must be given within a reasonable time after the payment, *à fortiori* it must be given within a reasonable time after the discovery of the fraud.

A number of American cases refuse to go to the length of the rule as laid down under the first proposition, but except in the rarest instances, they have all refused recovery unless the utmost diligence was used after the forgery came to light.

It is submitted that the rule is just. As said by Mr. Justice Story in *United States Bank* v. *Bank of Georgia*, *supra*, p. 344.

> " If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach ; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt,

there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility."

The last proposition is stated by Mr. Justice Putnam, in the court below, to be "thoroughly settled as a principle of law in the United States." (Record, p. 38.) That he was justified in this statement appears from the following cases:

*United States* v. *Clinton National Bank*, 28 Fed. Rep. 357.

It was there stated by Mr. Justice Brewer that the principle that it is necessary "that the maker, acceptor, or other party who demands restitution of money paid under a forged signature of the drawer of a bill should make the demand without unnecessary delay," is "sustained by the common voice of the authorities."

*United States* v. *Central National Bank of Philadelphia*, 6 Fed. Rep. 134.

Money was paid under a forged indorsement, but no notice was given prior to bringing suit. Judgment was given for the defendant by Justices Butler, Cadwalader and McKennan.

*United States* v. *Cooke*, Fed. Cas. 14,855.

A delay of more than six years after making a payment under a forged indorsement was held to be fatal to recovery.

*United States* v. *National Exchange Bank*, 45 Fed. Rep. 163.

About March 11, 1890, the plaintiffs discovered that they had made a payment under a certain forged indorsement. Notice was given the defendant April 17th. The Court said

> "This was, within all the cases, an unreasonable time to wait. The notice should have been given without unnecessary delay after discovery of the fraud to enable the bank to pursue any remedy it might have against the forger or indorsers."

*The President, etc., of the Gloucester Bank* v. *President, etc., of the Salem Bank*, 17 Mass. 33.

The plaintiff failed for over a month to give the defendant notice of a forgery under which it had paid the defendant. It was held that the plaintiff had lost its right to recover, and the Court said,

> "The question in this case is, whether, as between these parties equally innocent and ignorant, the loss shall remain where the chance of business has placed it, or shall be shifted back upon the

Salem Bank, who may be considered as having, by good fortune, rid themselves of it."

*Raymond* v. *Baar*, 13 Serg. & Rawle (Pa.) 318.

A delay of six months in giving notice of a forgery of a draft was held "most unreasonable negligence. It was his (the plaintiff's) duty to return it to the defendant as soon as he discovered it to be counterfeit. . . . It is what is termed in law *crassa negligentia*, gross negligence, and he ought to suffer for it."

3 KENT'S COM. 12 Ed. 108, *85 (note, per Mr. Justice Holmes).

"The acceptor is held to be at liberty to show a forgery in the body of the paper, and if he has paid the forged amount, may recover it back from the person to whom he has paid it, provided he has been guilty of no negligence in failing to detect the forgery, and has given notice of the forgery as soon as discovered."

3 KENT'S COM. 12 Ed. 111, *86, Note B.

"None but the payee can assert any title to a negotiable bill or note without his endorsement, but the loser cannot recover back, unless he uses diligence to detect the forgery, and give notice, and there be no unreasonable delay after the discovery of the forgery."

Daniel on NEGOTIABLE INSTRUMENTS, 5th Ed. §1371.

"It is undoubtedly necessary that the maker, acceptor, or other party who demands a restitution of money paid under a forged endorsement or under a forged signature of the drawer of a bill, should make the demand without unreasonable delay."

(B)—A number of cases allowing recovery of money paid under a forged indorsement will be found to conform to the rule that notice must be given within a reasonable time. Several, indeed, expressly recognize the correctness of the principle.

*Canal Bank* v. *Bank of Albany*, 1 Hill. (N. Y.) 287.

Here the Court held that while the lapse of time in discovering the forgery is in the abstract unimportant, there must be reasonable diligence in giving notice, after a discovery of the forgery.

*Bank of Commerce* v. *Union Bank*, 3 Comst. (N. Y.) 230.

Delay was held not necessarily fatal, "provided notice of the forgery be given as soon as it is discovered."

*Ellis & Norton* v. *Ohio, etc., Co.*, 4 Oh. St. 628, 657,

The Court said,

> "When money is thus paid upon a forgery, it is sufficient to give notice, without unreasonable delay after the forgery is discovered."

*Bank of Commerce* v. *Union Bank*, 3 Comst. (N. Y.) 230.

The plaintiff was allowed to recover, having given notice of the forgery immediately upon its discovery. At page 237 the Court said,

> "In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill, is excused, provided notice of the forgery be given as soon as it is discovered."

*Frank* v. *Lanier*, 91 N. Y. 112.

Delay in discovering the forgery was held not to be fatal, as notice was given within a reasonable time thereafter (in this case within twelve hours).

*United States* v. *National Bank of the Republic*, 2 Mack. (Dist. of Col.) 289.

The forgery of the indorsement was discovered in three years and the defendant was notified within six

days thereafter and furnished with all proofs of the forgery by the Government. It was held that the notice was reasonably prompt and the plaintiff might recover.

*Merchants Bank* v. *Marine Bank*, 3 Gill. (Md.) 96.

In this case notice was given on the very day of the discovery of the forgery and a return of the money was demanded (see page 98).

*Goddard* v. *Merchants Bank*, 4 N. Y. (4 Comstock) 147 (Affirmed, same v. same, 2 Sandf. (N. Y.) 147).

It appeared that on discovery of the forgery "notice was immediately given to the defendants and repayment of the money demanded, which they refused" (see page 148).

*Star Fire Insurance Company* v. *New Hampshire National Bank*, 60 N. H. 442, 443.

"Immediately on discovery of the forgery the plaintiffs notified the defendants, presented the draft, and demanded repayment of the money paid upon it."

*McCall* v. *Corning*, 3 La. Ann. 409.

Notice of the forgery was given forthwith — as soon as the forgery was discovered.

*Wilkinson* v. *Johnson*, 3 B. & C., 428.

The plaintiff gave the defendart immediate notice of a forged indorsement. It was held that he might recover.

*Ellis & Morton* v. *Ohio Insurance & Trust Company*, 4 Oh. State, 628.

The plaintiff, suing to recover money paid on its forged check, was held to have been improperly nonsuited. The fraud was discovered within ten days of the payment and notice was given forthwith upon discovery (see page 649).

*Carpenter* v. *Northborough National Bank*, 123 Mass. 66.

The plaintiff was allowed to recover under these circumstances: "The note was soon after shown to William Carpenter who pronouncedhis signature a forgery. The plaintiffs thereupon notified the defendant" of the forgery, etc.

If the Court should believe that the last group of cases (cited under B) were correctly decided in spite of

the lapse of time between the payment and the notice, they are still entirely consistent with the proposition that the Government is barred, if not by the failure to discover the fraud, at least by failure to give notice of its discovery. In the cases allowing recovery the defense of the holders was [redacted] the failure of the banks to give notice of the discovery of the fraud, [redacted]. The negligence in the former case relates to preventive measures, in the latter to curative measures; in the former it is unconscious, in the latter conscious; in the former neither party thinks of fraud or loss, in the latter one party knows that fraud has been committed and that loss must fall either on himself or on the other unless he gives prompt notice, and, notwithstanding this knowledge, neglects to give such notice.

(C)—The Government contends that the true rule is, not that notice of a forgery must be given within a reasonable time of its discovery, but that the plaintiff may recover, no matter how long the delay, provided that it does not affirmatively appear that the defendant has suffered actual damage thereby.

That rule is laid down in a small number of cases, but it will be found upon analysis that in most of them notice of the forgery was in fact given shortly after its discovery, so that it was not necessary for the Court to decide that unreasonable delay in giving notice was not fatal. For example in,

*United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259 (Affirmed, same v. same, 64 Fed. Rep. 703),

the forgery was discovered in two years, but notice was given to the defendant within three days thereafter. It was held that the plaintiff might recover.

*Oppenheim* v. *West Side Bank*, 50 N. Y. Supp. 148, 152.

The Court's statement of the proposition relied upon by the plaintiffs in this case was dictum, as in fact the indorsee under the forged endorsement was notified personally on the very day of the discovery of the forgery, and received formal written notice three days thereafter.

Mr. Daniel, 5th Ed. § 1372, expresses some leaning toward the plaintiffs' position, saying: "But there is high authority for the more liberal, and we think, wiser and juster doctrine,"— that is, the doctrine claimed by the plaintiffs. This, however, as stated by Mr. Justice Putnam in the court below, "so far from denying the established rule, admits it, and only takes cognizance of some supposed expressions the other way." All of Mr. Daniel's citations in support of his suggestion have been examined, and they fail to support it. They are as follows:

2 PARSONS, NOTES AND BILLS, 2d. Ed. 298.

This citation apparently recognizes the reasonable time rule and approves several decisions, in one of which "a considerable delay" was held fatal; in another seven days was held fatal; in another a fortnight; in another eighteen days; in another ten days; and in another fifteen days.

*Third National Bank* v. *Allen*, 59 Mo. 310.

The plaintiff learned of the forgery the day after the payment and notified the defendant that day or the day following. The Court held that notice was given within a reasonable time, which was all that was required.

*Koontz* v. *Central National Bank, etc.*, 51 Mo. 275.

It does not appear that there was any delay in notifying the defendant of the forgery.

*White* v. *Continental National Bank*, 64 N. Y. 316.

In this case it was expressly stated that the plaintiff gave the defendant notice immediately upon discovery of the forgery.

*Welch* v. *Goodwin*, 123 Mass. 71.

It was stated at page 71 that notice was given immediately upon discovering the forgery and at page 78

the Court expressly laid out of consideration the question now being discussed.

> *First National Bank of Crawfordsville* v. *First National Bank of Lafayette*, 4 Ind. App. 355.

The plaintiff expressly averred that he gave notice immediately upon discovering the forgery.

> *First National Bank of Chicago* v. *Northwestern National Bank of Chicago*, 152 Ill. 296.

The Court stated that the acceptor might recover money paid provided demand was made within a reasonable time after discovering the forgery. In this case less than one business day elapsed.

> *Canal Bank* v. *Bank of Albany*, 1 Hill. (N. Y.) 287, 291.

This case dealt solely with delay in discovering the forgery and expressly laid out of consideration delay in giving notice thereafter.

Upon one authority, however, more than any other, the counsel for the plaintiffs pin their faith; and it is also strongly relied upon by Mr. Justice Aldrich in his dissenting opinion in the court below. That case is

*United States* v. *National Park Bank of New York*, 6 Fed. Rep. 852,

decided by Choate, J., in the District Court for the Southern District of New York in 1881. In this case one Dunlap received from a United States Paymaster a draft on the Assistant Treasurer at New York. It came to the defendant through a bank for collection, Dunlap's endorsement being forged. The defendant collected it and credited its correspondent. Ten years later the plaintiffs discovered the forgery and neglected to notify the defendant for one year thereafter. It was held that the defendant was liable for the money in the absence of proof of damage by the delay; and the Court said that negligence in notification without damage is no defense, distinguishing the case of counterfeit money on the ground that there, failure to give notice would necessarily prejudice the defendant as he would be unable to trace it.

In dealing with this decision, it is only to be said that it was apparently a case of first impression, and that it is contrary to and irreconcilable with the whole course of authority.

In support of his main position Judge Choate cites nine cases, no one of which supports him. They are as follows:

(1) *Kingston Bank* v. *Eltinge*, 40 N. Y. 391.
(2) *Meyer* v. *The Mayor, etc., of New York*, 63 N. Y. 455.

(3) *Pardee* v. *Fish*, 60 N. Y. 265.
(4) *Union National Bank of Troy* v. *Sixth National Bank of New York*, 43 N. Y. 452, 456.
(5) *Allen* v. *Fourth National Bank*, 59 N. Y. 12.
(6) *National Bank of Commerce* v. *National Merchants Bank, etc.*, 55 N. Y. 211.
(7) *Continental National Bank* v. *National Bank of Commonwealth*, 50 N. Y. 575.
(8) *United States* v. *Union National Bank*, Fed. Cas. 16,597 (Affirmed, 16,596).
(9) *Welch* v. *Goodwin*, 123 Mass. 71.

In the first case it was held that the owner of a judgment upon which an execution had been issued and a sale of property made, might maintain an action to recover back the money received by the sheriff thereunder from one to whom it had been paid with such owner's consent, under a mistake of fact. No question of negotiable paper was involved.

In the second, the plaintiff, owning a lot in the City of New York and intending to pay an assessment thereon, by mistake paid an assessment on the lot of another. In a suit by him to recover back the money, it was held that in the absence of evidence showing that the city could not be restored to its original position upon repayment, the plaintiff might recover.

In the third, there was no question of any forgery but there was some delay in presenting for payment a negotiable certificate of deposit issued by a bank, payable on demand. It was held that the delay did not discharge the indorser.

In the fourth, there was no question of forgery of negotiable paper, but a payment of money was made under a mistake of fact. No question of unreasonable delay was involved.

In the fifth, the plaintiff was allowed to recover a payment made on a forged certificate of deposit. It appeared (page 19) that notice was given on the evening of the discovery of the forgery.

In the sixth it was held that a payment made by a bank on the raised check of another bank might be recovered, in the absence of proof of damage. At page 217 the Court said, "Delay in discovering and giving notice of the mistake is complained of, but the evidence shows that notice was given immediately on the discovery of the mistake" . . .

In the seventh, it was held merely that where a bank negligently certifies a check to the damage of an innocent party relying thereon, the bank is bound thereby.

In the eighth, it was held that where the United States discovered a mistake in making a payment of money, but neglected to give notice until the defendant lost his remedy over, they cannot recover. No other facts were stated, but the opinion, which was written by Mr. Justice Choate himself, assumed, as a matter of course, that in case of a payment of money under a mistake of fact, there arose "a duty of promptly notifying the defendant on discovery of the mistake."

In the ninth, as above stated in discussing Mr. Daniel's position, notice was given immediately upon discovery of the forgery, and the Court expressly refused to consider the question here involved.

Mr. Justice Choate admitted that the first seven of the cases above cited applied rather to negligence in making payment and discovering the mistake, than to delay in giving notice of for discovery, but considered that the same principle might apply in the latter case.

The other cases cited in his opinion dealt with the rights of one making a payment upon counterfeit currency, and held that in such a case, delay in giving notice of the forgery after its discovery would be fatal. The Court sought to distinguish those cases on the ground that there, immediate notice was necessary to enable the party defrauded to pursue his remedy against the party uttering the counterfeit instrument. It is believed that Judge Choate's distinction between forged and counterfeit paper is untenable. It is quite as important to the party receiving the money to have proper notice in one case as in the other, in order to take effective measures to protect his interests.

It is not unworthy of notice that the case is open to attack also on quite another ground, i. e., because it allows the recovery from an agent of money paid by it in good faith to its principal.

Cf. *Wells, Fargo & Co.* v. *United States*, 45 Fed. Rep. 337, 340.

## III.

The plaintiffs did not give the defendant notice

of the forgery within a reasonable time after its discovery.

A.— UNDER GENERAL RULE.

Supposing the defendant's last position to be conceded, was notice given within a reasonable time? From the statement of facts it appears that the forgery of the Mooy checks was discovered June 18, 1897, and notice was given to the defendant December 18, 1897. (Record, page 11.) The forgery of the other checks, except thirteen of those drawn payable to Mary Shambell and Susan A. Lake, was discovered between February 19, 1898, and May 29, 1898. (Record, page 12.) Notice thereof was given to the defendant July 22d, 1898. (Record, p. 12.)

The forgeries of thirteen checks drawn payable to Mary Shambell and Susan A. Lake were discovered May 21, 1898, and May 28, 1898, but no notice thereof was given until the commencement of suit on August 27, 1901. (Record, p. 12). The respective delays, then, may be summarized as follows:

Mooy checks 6 months.

Majority of checks 1 month and 25 days to 5 months and 3 days.

Thirteen Shambell and Lake checks 3 years and 3 months (approximately).

It is submitted that under all the authorities previously cited, the delay in each of the above instances was fatal. With the single exception of Judge Choate's

decision in *United States* v. *National Park Bank of New York*, *supra*, not a case can be found in which recovery was allowed after so long a delay in giving notice as occurred in all of the above instances in this case, and in many of the cases it was expressly decided that a much shorter delay would bar recovery.

B.—SPECIAL RULE UNDESIRABLE.

Nor would it be well to make a special rule for any case with regard to the length of time to be deemed reasonable. The rights of parties to commercial paper have been and ought to remain absolutely fixed; and the courts have always been extremely reluctant to depart from regular rules of decision where such paper is involved. The doctrine of *stare decisis* is here of the utmost importance in order that business men may know where they stand.

In

> *United States* v. *Bank of the Metropolis*, 15 Pet. (U. S.) 377, 392,

it was well said, quoting an earlier case,

> "'The liability of parties to a bill of exchange or promissory note has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions and

cannot now be departed from.' From the daily and unavoidable use of commercial paper by the United States they are as much interested as the community at large can be in maintaining these principles."

And in

*First National Bank of Detroit* v. *Burkham*, 32 Mich. 328, 331,

Cooley, J., said,

"The beauty and value of the rules governing commercial paper consist in their certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper as between payee and drawee both acting in good faith could be made to depend on the motives which influenced the latter to honor the paper."

Citations to this point need not be dwelt upon; they are extremely numerous, and the principle is well settled.

## IV.

**Proof of damage by the delay in giving notice is not necessary.**

The correctness of this proposition is involved in and necessarily follows from that stated in the next to the

last heading. If it is a strict rule of law that notice of a forgery must be given within a reasonable time of its discovery, and if, as appears from the cases cited, a reasonable time is from three to six days at the most from the date of discovery, it is clear that proof of damage after the lapse of that time need not be offered by the defendant, and even that evidence of absence of damage, if introduced by the plaintiff, would be irrelevant.

> *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163.

That damage will be presumed under such circumstances was expressly held by Mr. Justice Story in

> *United States Bank* v. *Bank of Georgia*, 10 Wheat. (U. S.) 333, cited *supra*.

In that case, as already noted, he said, page 344,

> "Proof of actual damage may not always be within his (the former holder's) reach; and therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will therefore presume a damage, actual or potential, sufficient to repel any claim against the holder."

It is submitted that the reasons advanced by the learned justice for presuming damage are sound. In many cases the facts are such that prompt notice of

the forgery not only might, but probably would, have enabled the party receiving payment thereunder to take steps to protect himself and to bring the forger to justice. Proof of this possibility or probability might be obtainable — but proof of the certainty of the result would be most difficult, even impossible, to obtain. Therefore the potential damage without proof of actual damage is held sufficient to repel the plaintiff's claim.

As was well remarked by Judge Rapallo in

> *Continental National Bank* v. *National Bank of the Commonwealth*, 50 N. Y. 575,
>
> "The arrest and detention of a swindler are powerful means in coercing restoration of property he has unlawfully obtained, and the loss of these means in consequence of a reliance upon the declarations of another estops that other from denying the truth of the declaration."

In

> *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163 (*supra*),

the Court, p. 167, said:

> "The notice should have been given without unnecessary delay after discovery of the fraud to enable the bank to pursue any remedy it might have against the forger or endorser."

To the same effect was

*Raymond* v. *Baar*, 13 Serg. & Rawle (Pa.) 318 (*supra*).

In

*President, etc., of the Gloucester Bank* v. *President, etc., of the Salem Bank*, 17 Mass. 33, 46,

Parker, C. J., said:

> "The defendants then had no means of looking up those from whom they had received the notes, and although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, the law itself will presume that a change of circumstances had taken place, which would justify them in resisting the action."

The application of the reasoning in the cases above cited seems particularly apt if it be remembered that in the case of the checks in question here (with the exception of the Mooy checks amounting to only $108.00), the plaintiffs had discovered the forgeries, collected the evidence against the forger, procured his indictment and secured his conviction, before they gave any notice whatever to the bank. In the case of some of the checks the plaintiffs even went to the extent of procuring the forger's formal deposition as to the forgeries and

brought this suit based partly thereon without giving the bank any notice. Who can say how far the bank's ability to recoup itself was affected by the forger's conviction and incarceration in prison, before it was notified of the claim against it, or what steps it might have taken to protect itself, or whether or not they would have resulted successfully if it had learned the facts while he was still free?

The precise point was considered in a very recent Pennsylvania case in which the arguments on both sides of the question were thoroughly considered on principle as well as authority, and the Supreme Court held squarely that upon discovering a forgery it is the absolute duty of a depositor in a bank which has paid out money upon his forged checks to give the bank prompt notice thereof; that his failure to do so will be an absolute defense to the bank in a suit by him to recover such money; and that the question whether greater promptness would have enabled the bank to recover the money from the forger will not be considered by the Court. It was expressly held that the depositor was not in this case negligent in failing to discover the forgeries earlier than he did, although they had extended through a period of nearly six years.

*McNeely Co.* v. *Bank of North America*, 70 Atl. Rep. 891 (Pa., Sup. Ct., June 2, 1908).

In this case the forgeries were discovered between January 1, 1904 and a date two or three weeks there-

after, but no notice was given to the bank until nearly three months afterwards. The court said (page 892),

> "When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for by withholding from it what he has discovered he can, as just stated, gain nothing, but it may lose all . . . He ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right."

(Page 893)

> "And again, in a suit brought by a depositor against a bank to recover the amount which it may have improperly paid on a forgery, the issue is the forgery. This issue ought not to be complicated with another, and a speculative one, as to whether anything might have been recovered from the forger, if prompt notice had been given to the bank of the forgery."

(Page 894)

> "When it is once shown that the plaintiff failed

> to give prompt notice of the discovery of the forgery, the plaintiff's right of action is gone. The law assumes, and does not find it necessary to conduct an inquiry to verify the assumption, that, had the notice been given promptly, the Central Bank might have taken steps to protect itself as against Williams."

The effect of the decision is apparently to overrule

> *Iron City National Bank* v. *Fort Pitt National Bank*, 159 Pa. St. 46,

which was one of the cases relied upon by Mr. Justice Lowell in deciding for the plaintiffs in the Circuit Court. (Record p. 23).

## V.

**If evidence of damage by delay is relevant, the burden of proof is on the *plaintiffs* to show absence of damage by the delay.**

Even if it be assumed, for the sake of argument, that the position taken above is not correct, that the authorities cited above under IV. were wrong, and that proof of damage or absence of damage by the delay is necessary, then the question arises, upon whom is the burden of proof? The question is answered by the case of

> *Smith* v. *Mercer*, 6 Taunt. 76,

where the Court, in deciding that the position of the defendant might be seriously affected by failure to receive proper notice, said (p. 81),

> " Nor do I think it will be an answer to observe that nothing of this sort is stated in the case; for the plaintiffs had no right to cast upon the defendants the burthen of such proof, which, in point of law, if the fact had existed and could have made any difference, it was for themselves to produce."

## PART II.

### I.

### Pension checks are commercial paper.

It is immaterial whether the instruments here involved are to be termed bills of exchange, drafts, checks or notes. They are in the ordinary form of a mercantile check, and it is enough that they have been held to be commercial paper by every Court before which the question has come. In all the cases cited by the parties in their original briefs in the court below, whatever differences of opinion there may have been on the question of necessity of proof of damage, all the judges agreed that paper of the kind in question was negotiable.

In

*United States* v. *Clinton National Bank*, 28 Fed. Rep. 357, cited *supra*,
*United States* v. *National Park Bank*, 6 Fed. Rep. 852, cited *supra*, and
*United States* v. *Central National Bank*, 6 Fed. Rep. 134,

the instruments were drafts by a paymaster on the Treasury Department.

In

*United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259, and
*United States* v. *National Exchange Bank*, 45 Fed. Rep. 163,

the instruments were drafts by a pension agent on the Treasury Department.

In

*United States* v. *Cooke*, Fed. Cas. 14,855,

the instrument was a draft by an assistant surgeon upon a United States paymaster.

In

*Wells, Fargo & Company* v. *United States*, 45 Fed. Rep. 337, at 340,

it was flatly held that a pension check was commercial paper; and in

the same proposition was assumed.

The court of claims has decided that a bill of exchange drawn by a purser in the navy on the Secretary of the Navy was a negotiable bill, and that the United States was responsible for 15% damages for declining to honor it. Devereux Reports (U. S. Ct. Cl.), page 27.

Caleb Cushing, Attorney General in 1856, gave his opinion that bills drawn by the agents of the Government on other agents or depositaries are negotiable paper. 8 Ops. Attys. Gen. 1, at pages 3, 4.

The language of the Revised Statutes and acts subsequent thereto show that it was not only their intention to authorize pension agents to issue negotiable instruments, but that it is was their intention to authorize the use of checks,— not mere warrants,— but checks which once issued should be subject to all the ordinary rules governing such paper.

Rev. Sts. §4765 provides, that upon the receipt of certain vouchers from the pensioner,

> "the agent for the payment of pensions shall immediately draw his check on the proper assistant treasurer or designated depositary of the United States for the amount due such pensioner, payable to his order, and transmit the same by mail, directed to the address of the pensioner entitled thereto."

The words "check" and "payable to order" are applicable only to a well-known negotiable instrument. If Congress had intended to pay its pensioners over the counter by warrants, proceeds of which could not be obtained until presented by them or their collecting agents at the sub-treasury, the word "warrant" would have been the appropriate word to use; for the payment by a warrant was the usual mode of payment by counties and municipal corporations.

Moreover, the statute provides that the agent shall draw his check "on the proper assistant treasurer *or designated depositary*" in payment of the pension. Now it is perfectly clear that under that statute the agent has authority to issue his check drawn upon a National Banking Association which is a depositary of funds of the United States, and it is equally clear that a check upon such a depositary is a negotiable instrument like any other check. Such was squarely held by this Court in two cases.

> *Bank of the Republic* v. *Millard*, 10 Wall. (U. S.) 152,
> *First National Bank of Washington* v. *Whitman*, 94 U. S. 343.

In the first of these cases the Court said,

> "It is hardly necessary to say, that the check in question having been drawn on a public depositary, by an officer of the government in favor of a public

creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents."

Inasmuch as pension checks on the assistant treasurer and on public depositaries are mentioned in such close proximity, and the agent of the government is authorized to use either indifferently, it seems fair to assume that the rules which would be applicable to one should be equally applicable to the other.

To provide against the danger of the check falling into wrong hands and the possibility of the pensioner suffering by reason of its negotiability, it was provided (Sec. 4765 *supra*) that "any pensioner may be required, if thought proper by the commissioner of pensions, to appear personally and receive his pension."

Rev. Stats. §3646 as amended by Act of February 16, 1885, Cap. 123, provides as follows:—

"Whenever any original check is lost, stolen, or destroyed, disbursing agents and officers of the United States are authorized after the expiration of six months, and within three years from the date of such check, to issue a duplicate check; and the treasurer, assistant treasurers, and designated depositaries of the United States are directed to pay such duplicate checks, upon notice and proof of the loss of the original checks, under such regulations in regard to their issue and payment, and upon the execution of such bonds, with sureties, to indem-

> nify the United States, as the Secretary of the Treasury shall prescribe. This section shall not apply to any check exceeding in amount $2500."

The above provisions, which apparently now govern the issue of duplicate pension checks would not be necessary unless the checks were regarded as negotiable.

Also in the following statutes the instruments are referred to as checks.

In Rev. Sts. §4784, afterwards repealed, it was provided that upon certain contingencies, "the *check* for the pension . . . shall be given direct to the hand of the party entitled thereto, if desired."

In 1 Supp. Rev. Sts., Cap. 639, p. 761, it was enacted,

> "that hereafter a *check* or *checks* drawn by a pension agent in payment of pension due, and mailed by him to the address of the pensioner, shall constitute payment . . . in the event of the death of the pensioner . . . before the receipt of said *check*." [Italics ours.]

In Section 2 of the same statute, the instrument is referred to as a check, as also in 2 Supp. Rev. Sts. p. 437, Cap. 193, end.

The plaintiffs have relied strenuously upon the language of this Court in *The Floyd Acceptances*, 7 Wall (U. S.) 666, at 681:

The Court there said that there was no express author-

ity in any officer of the Government to draw or accept bills of exchange; that the authority to do so, not being one expressly given by statute, could only arise as incident to the exercise of some other power; and that as there could be no lawful occasion for any department of the Government or for any of its officers or agents to accept drafts drawn on them under any statute or other law then known to the Court, such acceptances could not bind the Government.

Accordingly, Mr. Daniel also says that it seems that there is no federal officer authorized to draw or accept drafts, for which he cites the same case. 1 Dan. on Neg. Inst., 5 ed. § 436. But it is submitted that the Floyd case can have no application here. It was decided in the year 1868, two years before the passage of the section providing for the drawing of pension checks, which was passed in 1870; and accordingly the fact that the Court did not then know of any statute expressly giving a federal officer authority to draw drafts, has no bearing. Under § 4765 of the Rev. Sts. such express authority was given a pension agent — unquestionably so, if he draw upon a public depositary.

Moreover the acceptances discussed in the Floyd case were accommodation acceptances, and the Court's statement may properly be taken to have referred to such only. In any event it was not necessary for the Court to decide that never under any circumstances could an officer of the Government draw or accept a draft, and in fact it carefully said that in case such authority should be granted, the rights of the Govern-

ment would be precisely those of an individual. In referring to the general power of an officer of the United States to become a party to bills of exchange, the Court says,

> "Whenever, in conducting any of the fiscal affairs of the Government, the drawing a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the Government in doing so." (Per Miller, J., at page 680.)

Furthermore the instrument exhibited as a sample in the case at bar conformed with all the requirements of the *Massachnsetts Negotiable Instruments Act*, Rev. Laws, Cap. 73, Sec. 18. It was an unconditional order; it was for a certain sum of money; it was to a person designated in the instrument or his order; it was payable on demand; it was signed by the agent of the maker duly authorized by Revised Sts. § 4765, and it was not, as contended by the plaintiffs, drawn against a particular fund, at least so far as could be gathered from anything within the four corners of the instrument, which is all that is important in determining whether an instrument is negotiable.

Alhough a check is ordinarily described as a draft upon a bank or banking house, that description is undoubtedly due to the fact that most checks are drawn upon a bank or banking house, but a check is not necessarily so drawn.

An order on a person who has agreed to advance money to the bearer may be by check.

*Industrial Bank of Chicago* v. *Bowes*, 165 Ill. 70 (1897).

The State courts have invariably treated pension checks as commercial paper:

In the case of

*Cranz* v. *White*, 27 Kan. 319,

the Court treats the deposit of and the dealings in these checks as in the regular course of business of the banks.

See also

*Falkenburg* v. *Johnson*, 102 Ky. 543.
*Bullard* v. *Goodno*, 73 Vt. 88.
*Friend* v. *Garcelon*, 77 Me. 25.
*Farmer & Sons* v. *Turner*, 64 Ia. 690.

## II.

If pension checks are not in every respect to be treated as commercial paper, they are to be so treated to the extent that the same rule requiring notice should be applied.

The reason why municipal and county warrants have been held not to possess those qualities of commercial paper which cut off equitable defenses of the parties thereto in the event of a bona fide transfer for value is that under any other rule it might seriously embarrass or even bankrupt a municipal corporation should its agent or agents fraudulently issue negotiable securities. But although this principle is controlling in every case upon which it bears, yet in cases which have dealt merely with the question whether municipal and county warrants are negotiable and which have not involved the consideration whether a bona fide transfer would destroy defenses (based on fraud in issue) they have regularly been held to be negotiable.

*Wall* v. *County of Munroe*, 103 U. S. 74, 77.
*Kelley* v. *Mayor of Brooklyn*, 4 Hill (N. Y.) 263.
*Harris* v. *United States*, 27 Court Claims 177.
*Dalrymple* v. *Whitingham*, 26 Vt. 345.
*Bull* v. *Sims*, 23 N. Y. 570.
*Ferguson* v. *Staples*, 82 Me. 159, 163.
*Varner* v. *Nobleborough*, 2 Me. 121.
*Crawford County* v. *Wilson*, 7 Ark. 214.
*Bromlee* v. *Board of Commisioners of Madison County*, 81 Ind. 186.
*Broyles* v. *Board of Commissioners of Madison County*, 83 Ind. 599.
*Craig* v. *Richmond Dist.*, 7 Leg. Int. 26 (Pa., 1850).
*Watson* v. *City of Huron*, 97 Fed. Rep. 449.
*Aylesworth* v. *Gratiot County*, 43 Fed. Rep. 350.
*Jerome* v. *Commissioners Rio Grande County*, 5 McCrary (U. S.) 639.

These authorities show that such a warrant is negotiable paper — subject, it is true, to equitable defenses, but not subject, so far as the cases show, to any further restrictions. It may be likened to a negotiable promissory note which is overdue, indorsement of which will, of course, pass legal title to the holder subject to such defenses as then exist.

The effect of the above cases is that even municipal or government warrants will be invested with the qualities of commercial paper, in so far as such construction is not forbidden by the rule of public policy before mentioned. No such consideration applies in this case against the defendant's position. No public policy requires that the Government should be allowed to escape the just consequences of a negligent delay of several months or years in giving notice of the discovery of a forgery upon its paper. That the reverse is true was well stated by Mr. Justice Putnam in the court below, where he said,

> "Any demand for prompt payment in case of forgery is wholesome. When discovered, a forgery should not be coddled, but should be made known both to the public prosecutor and to those immediately concerned, and any attempted test with reference to the qustion whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory because the determination whether one who has suffered by forgery may recoup himself is more a matter of chances which cannot be estimated than the result of logical investigation of particular facts." (Record, p. 40.)

Furthermore there is good reason for a legal distinction between the checks of the Government and municipal or county warrants. The latter are comparatively few in number and are ordinarily negotiated to people in the locality who could without inconvenience present them in person. The payments by the Government, however, are large in number and are made in places at great distances from the capital. The aid of banks has therefore generally been utilized in their collection. As no bank could afford to take the risk of cashing them unless they were negotiable, they have been treated as negotiable in mercantile transactions.

## PART III.

### I.

**That the United States are parties plaintiff in this action is immaterial.**

(A)—As a party to such paper the United States stand in the position of any other litigant.

The rule is clearly settled and has never been departed from, that if the Federal Government becomes a party to negotiable paper, its rights and liabilities with respect to it are the same as those of a private person.

*United States* v. *Bank of the Metropolis*, 15 Pet. (U. S.) 377, 392, 393.

The Court there said,

> "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibilities of individuals who are parties to such instruments."
>
> *United States* v. *Barker*, 12 Wheat. (U. S.) 559, 561.

It is there held that where the United States are holders of a bill of exchange, a delay of one day beyond the usual time of giving notice of non-acceptance to an indorser is fatal.

The above proposition is also supported by the following cases:

*Cooke* v. *United States*, 91 U. S. 389, 396.
*The Floyd Acceptances*, 7 Wall. (U. S.) 666, 675.
*United States* v. *Clinton National Bank*, 28 Fed. Rep. 357.
*United States* v. *Central National Bank of Philadelphia*, 6 Fed. Rep. 134.
*United States* v. *Cooke*, Fed. Cases, No. 14,855.
*United States* v. *National Exchange Bank*, 45 Fed. Rep. 163.
*United States* v. *Beebee*, 17 Fed. Rep. 36.
*Walker* v. *United States*, 139 Fed. Rep. 409.
*United States* v. *State Bank*, 96 U. S. 31, 36.
*Mountain Copper Co.* v. *United States*, 142 Fed. Rep. 625.
*Buchanan* v. *Knoxville, etc., Co.*, 71 Fed. Rep. 324, at p. 331.

(B) — If the foregoing proposition is correct, the Government may be bound by negligence of its agents in giving notice of the discovery of a forgery.

Such was expressly held in

*Cooke* v. *United States*, 91 U. S. 389, cited *supra*.

The Court there said, at page 398,

> " Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost."

Practically similar expressions will be found in almost all of the cases last cited.

## II.

The United States cannot properly claim that in dealing with these checks they were outside the domain of commerce, so as to avoid the application of *Cooke* v. *United States*.

Of course the United States Government, acting within the sphere of the powers granted to it under the Constitution, is always and everywhere sovereign. Neverthess, in certain classes of cases, the Government, in spite of its sovereignty, will be treated by the courts *as if* it were a private individual and will not be allowed to take an unfair advantage of its position to the damage of its subjects, because the Government itself has voluntarily drawn this line, over which it will not step. The law is therefore clear that if the transaction is an ordinary business dealing similar to that commonly had between merchant and merchant, as the drawing of a negotiable instrument, and *was authorized*, the rights and liabilities of the United States will be the same before the courts as the rights and liabilities of a private individual.

> *United States* v. *Barker*, 12 Wheat. (U. S.) 559, 561, cited *supra*.

That the regular rules of commercial law are applicable to such cases, affirmatively appears from the discussion of the Court in

> *Wells, Fargo & Co.* v. *United States*, 45 Fed. Rep. 337, 340.
> *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259.

In the present case in the court below, Mr. Justice Aldrich, who wrote the dissenting opinion, seemed

strongly influenced by the consideration, that in dealing with the payment of pensions the Government was engaged in dispensing a charity and could not b on-sidered within the domain of commerce. It is submitted that the learned Justice might properly have distinguished between the philanthropic motive which caused the Government to direct its agent to pay a certain sum of money to the pensioner, and the commercial instrument it authorized that agent to use in carrying out its purpose. The former related to the Government and the pensioner alone. The latter, being a negotiable instrument, might relate, and in this case did relate, to third parties. It was, as to the latter, a matter of indifference whether the Government's check was drawn in payment for past services or for future services or for no services. Had the check been drawn on a national depositary, the latter would have had no more necessity or right to consider the Government's motives in issuing that check than it had to consider the motives of the Red Cross in drawing on it, for another apparently philanthropic purpose. The Government chose to avail itself of the many obvious advantages of making the payments to pensioners by checks. It thereby incurred certain accompanying disadvantages. It doubtless weighed the two and decided wisely that the advantages outweighed the disadvantages. In order the more efficiently to carry out its benevolent purpose, it laid aside its sovereignty, and chose a well-known commercial instrument subject to definite rules. By its own choice therefore it put itself on a par with its merchant

subjects and agreed to abide by the law merchant, because otherwise the chance of loss would unfairly be put upon those accustomed to rely upon that law.

It cannot be said that the government did not enter the domain of commerce because the checks were issued in payment of its own indebtedness. This was true in many of the cases above cited, true of the treasury notes in *Cooke* v. *United States*, issued in payment for money borrowed; and the proposition is disposed of by the decision in *United States* v. *Bank of the Metropolis*, 15 Pet. (U. S.) 377, in which the United States paid its indebtedness to mail contractors by accepting the drafts drawn by the contractors.

The case of *Cooke* v. *United States* also disposes of another argument strongly relied upon by Mr. Justice Aldrich in the court below. To a considerable extent he based his opinion upon the argument that it was not made the special duty of a particular official to give notice, and that *Cooke* v. *United States* only applies provided a particular official has been specially charged with the performance of a duty which he neglects with consequent loss. At p. 43, Record, he accordingly cites that case (p. 398) as follows:

> "'Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty, and authorized to represent the Government in that behalf, neglects that duty, and loss ensues, the Government must bear the consequences of his neglect. But this cannot happen until the officer

> specially charged with the duty, if there be one, has acted, or ought to have acted,'"

The citation of the remainder of the paragraph from which he quoted, seems to answer his objection. The opinion in *Cooke* v. *United States* continued as follows (p. 398):

> "As the Government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world."

If there is no officer charged with the duty of giving notice, the United States are responsible for this state of affairs. If any officer is charged with that duty, the Government is bound by his failure to give proper notice.

As a matter of fact, however, the Government has representatives who ought to give early notice in a case of this kind. There is nothing in the relation of the executive departments which made a delay of several months in giving notice of the forgery reasonable.

An investigation was started in pursuance of the provisions of Revised Statutes, Sec. 4744; on June 18, 1897, the Pension Bureau were informed of certain of the forgeries; from February to May, 1898, of the remainder. (Record, pp. 11, 12.)

It being necessary for the United States to bring suit, it was the duty of the Pension Department to turn the matter over to the Department Justice. (See Rev. Sts. §§ 356, 360, 361.)

Prompt notice being a condition precedent to the right of the United States to recover, it was the duty of either the Pension Department to give such notice, or of the Department of Justice as a part of its duties in prosecuting the suit. The responsibility for giving notice rested with one or both of these Departments.

The Pension Department must be presumed to have known that prompt notice was necessary; and it was therefore its duty either to give the notice promptly or to place the matter promptly in the hands of the Department of Justice so that that Department might promptly give the notice.

In dealing in commercial matters the relation between the Pension Department and the Department of Justice is the same as that between an individual and his counsel. No one would pretend that a delay of several months or years in giving notice of a forgery is to be justified, in order to give an individual an opportunity to place the matter in the hands of counsel.

These checks were drawn on the Treasury Department. It is submitted that under these circumstances the Treasury Department really acts as a bank of deposit for the Pension Department exactly as a Government depositary does, and no more delay should be allowed than in the ordinary case of a bank and its depositors. Indeed, in the main brief filed on behalf of

the United States in the court below, at page 5, the Government said,

> "It is submitted that for the purposes of this case the Assistant Treasurer and Pension Agent stand in the relation of banker and depositor."

If, as shown by the authorities cited above, the United States are bound by the same rule as private parties in regard to commercial paper, delay would certainly not be excused because matters may pass through several departments. Is it possible to limit the rule to departments at the head of which there is a member of the President's cabinet? Is it possible to apply the rule when, as is the case from time to time, a sub-department is transferred from one department to another?

As our great private corporations continue to grow, with their several departments and branches, why could they not plead the same reasons for delay, and thus gradually overthrow the whole law as to commercial paper on which our business interests rest, for the United States has undertaken the same responsibility as a private individual.

The present case affords the plaintiffs neither an equitable nor a legal claim against the defendant. The Government has paid out certain moneys, and because

it learns that the payments were made in reliance upon forged indorsements seeks to place its loss upon the bank, which, in good faith and with due care first honored the checks issued in payment. The Government seeks to place this loss on the bank notwithstanding the facts that it issued over two hundred checks and put them into circulation under circumstances calculated to deceive this or any other bank; that during the whole time it had in its possession, but failed to use the means of detecting the forgeries; that it failed to notify the bank of the forgeries for very long periods after payment; and that it continued to issue such checks after the first forgeries, and failed to notify the bank for months or years after discovering them. To accomplish this inequitable purpose, the Government must legally maintain either the position that the bank must prove how, if it had received reasonable notice, it could have recoverd the money it paid out, or the position that the bank is in an exceptional position because the check was that of the Government or was a pension check. It is submitted that it can maintain no one of these positions and that legally, as well as equitably, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

THEODORE FRANCIS GREEN,
*Attorney for defendant in error*

## UNITED STATES *v.* NATIONAL EXCHANGE BANK OF PROVIDENCE.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 90. Argued January 25, 26, 1909.—Decided June 1, 1909.

The United States can recover from a bank presenting pension checks to, and receiving the money therefor from, a sub-treasury, where the names of the payees have been forged; and the right to recover is not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the bank.

The United States is not chargeable with the knowledge of the signa-

tures of the vast numbers of persons entitled to receive pensions, and the exceptional rule as to certain classes of commercial paper that the person having knowledge of the genuine signature of the payee whose signature is forged is negligent in paying on such an indorsement and therefore cannot recover, does not apply to the United States in regard to pension checks. *Leather Manufacturers' Bank* v. *Merchants' National Bank*, 128 U. S. 26, approving *White* v. *Continental National Bank*, 64 N. Y. 316, followed.

*Quære* and not decided whether government pension checks are not official warrants, but checks, and, as such, subject to the general rules of commercial paper as between private parties.

151 Fed. Rep. 402, reversed.

THIS action was brought by the United States to recover the sum of payments made at the sub-treasury in Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. The National Exchange Bank of Boston was originally sole defendant, but in legal effect the National Exchange Bank of Providence was substituted as defendant, and the issues were made up between it and the United States. We shall hereafter refer to that bank as the Exchange Bank.

The cause was tried upon an agreed statement and the material facts may be thus summarized:

Upon receipt of pension vouchers, regular in form and purporting to be executed by the pensioners named therein—but which in fact were forgeries—the United States pension agent at Boston drew the checks in question upon the sub-treasury at Boston, aggregating $6,362.07, in favor of the pensioners named in the vouchers, and transmitted such checks by mail directly to the address of each pensioner as given in the vouchers, in accordance with the provision of § 4765, Rev. Stat. Of the persons named in the checks fifteen had died, and the others were the widows of soldiers who had remarried, and whose right to a pension had ceased, all the names, however, as we have said, having been forged. With but two exceptions the checks were either for $24 or $36.

The checks with the forged indorsements thereon of the

payees were cashed by the Exchange Bank, and immediately indorsed to a national bank in Boston for collection. The checks were presented by the collecting bank at the subtreasury of the United States in Boston. The collecting bank received payment of the same and accounted for such payment to the Exchange Bank.[1]

In May, 1897, a special examiner of the Pension Bureau was detailed at Providence to investigate the case of one Mooy, a deceased pensioner, in whose name three of the checks here in question, each for $36.00, had been issued and paid in 1896. On June 18, 1897, the examiner reported to the bureau the forgery of the name of the deceased payee, and that it had probably been done by one William A. Munson. December 18, 1897, notice was given to the Exchange Bank by the United States attorney at Providence that the indorsements of Mooy's name to said checks were forged, and that at a proper time reclamation would be made for the money paid to the bank upon the checks. The remaining forgeries were discovered at different times during the months of February, March, April and May, 1898, and in December, 1898, Munson, who was undergoing imprisonment upon a sentence imposed June 22, 1898, for forging a pension check, with which presumably this case is not concerned, admitted that he had forged the signatures of the payees on the checks in suit.

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[1] The payments were made as follows:

| | | |
|---|---|---|
| During 1886, 1887 and 1888, five checks, each for $36.00, were paid on account of pension certificate issued in name of Martha Crampton | | $180 00 |
| During 1892 | $334 80 | |
| 1893 | 867 27 | |
| 1894 | 1,092 00 | |
| 1895 | 1,380 00 | |
| 1896 | 1,620 00 | |
| 1897 | 888 00 | |
| | | 6,182 07 |
| | | $6,362 07 |

On July 22, 1898, the United States attorney at Providence made written demand upon the Exchange Bank to be refunded the sums paid, except as to checks aggregating $351.27, for which no demand for repayment was made other than by the bringing of this action. The bank refusing to repay, this action was commenced on August 27, 1901.

Each of the 194 checks was made the subject of two counts. An indebtedness of the defendant bank to the United States was averred in the first count to have arisen from the fact that a described check had been lawfully issued by a United States pension agent, drawn upon the Assistant Treasurer of the United States, that a signature, purporting to be that of the payee, was thereafter forged upon the check, and that the Exchange Bank indorsed said check and presented it for payment to the Assistant Treasurer, who paid the amount thereof. The second count was the common count for money received by the defendant to the use of the United States. In substance, the defenses interposed in the answer of the bank were that if the facts averred in the declaration were established by the proof, the bank was yet not liable, because the action had not been brought within a reasonable time after the alleged payments of the drafts, nor had prompt notice been given of the discovery of the forgeries. It was also averred that the United States had been negligent in not verifying the signatures of the payees of the checks in suits by comparing them with signatures of the payees in its possession.

Upon the agreed facts the Circuit Court entered judgment against the bank for the full amount claimed with interest. The appellate court, however, reversed this judgment, and remanded the cause with directions to enter judgment for the Exchange Bank (151 Fed. Rep. 402); and this writ of error was thereupon prosecuted.

*Mr. Assistant Attorney General Fowler*, for plaintiff in error, submitted:

The Government's right of action is not defeated by the

failure of its agents to give notice to defendant of the forged indorsements immediately upon the discovery thereof. The rule adopted by the Circuit Court of Appeals is not in accord with sound reasoning or with the weight of the authorities. *United States* v. *National Park Bank*, 6 Fed. Rep. 852; *United States* v. *Bank*, 13 D. C. Rep. 296; *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259; *Cooke* v. *United States*, 91 U. S. 389, 402, 403; 5 Cyc. Law and Procedure, pp. 546, 547; *White* v. *Continental National Bank*, 64 N. Y. 316, 321, 322; 2 Daniel on Negotiable Instruments, § 1372.

The pension checks in question were not commercial paper in the strict sense of that term. *The Mayor* v. *Ray*, 19 Wall. 468, 477; *Wall* v. *County of Monroe*, 103 U. S. 74, 78; *Claiborne County* v. *Brooks*, 111 U. S. 400, 408; *District of Columbia* v. *Cornell*, 130 U. S. 655, 661; *Floyd Acceptance Cases*, 7 Wall. 666, 676.

The Government of the United States cannot be bound by the laches of its officers in failing to give notice within proper time that the indorsements on the checks in question were forgeries.

The rule laid down in *United States* v. *Cooke*, Fed. Cas. No. 14,855, that when the Government becomes a party to a negotiable instrument, it is bound to take the same steps to perfect its rights as is an ordinary individual, does not apply in case the checks in question are not negotiable instruments. It should not be applied here, even if it be held that the checks are negotiable instruments, because, as heretofore shown, the Government's right of action does not depend upon the giving of notice to the defendant. If such notice were a necessary prerequisite to the bringing of the action, as is the fact of giving notice of the dishonor of commercial paper, the rule laid down in *United States* v. *Cooke* is a proper one. But where plaintiff's right of action exists, and the neglect to give notice can only be set up as a matter of defense, then it presents precisely the same question as any other act of negligence upon the part of the Government's officials.

*Mr. Theodore Francis Green* for defendant in error:

In case of a payment under a forged indorsement of commercial paper, the plaintiff, in order to recover, must have given notice of the forgery within a reasonable time after payment. This is clearly the rule in England. *Cocks* v. *Masterman*, 9 B. & C. 902 (1829); *Mather* v. *Lord Maidstone*, 18 C. B. 273, 294; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Smith* v. *Mercer*, 6 Taunt. 76.

To the same effect in general, see *Bloomer* v. *Spittle*, L. R. 13 Eq. 427 (1872); 2 Parsons, Notes and Bills, 598.

In the United States Federal courts also, a high degree of diligence has been required. *United States* v. *Cooke*, Fed. Cas. No. 14,855; *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333.

Within the rule of the above cases an unreasonable time elapsed between the payment of the checks in this case, and the notice to the defendant of the forgery. The period varied from eighteen months, in the case of the Mooy checks to over eleven years in one instance, and averaged from two to five or six years.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, to recover, must have given notice of the forgery within a reasonable time after its discovery. *United States Bank* v. *Bank of Georgia*, 10 Wheat. 344; *United States* v. *Clinton National Bank*, 28 Fed. Rep. 357; *United States* v. *Central National Bank of Philadelphia*, 6 Fed. Rep. 134; *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 33; *Raymond* v. *Baar*, 13 Serg. & Rawle (Pa.), 318; *Canal Bank* v. *Bank of Albany*, 1 Hill (N. Y.), 287; *Bank of Commerce* v. *Union Bank*, 3 Comst. (N. Y.) 230; *Ellis* v. *Ohio &c. Co.*, 4 Ohio St. 628, 657.

The Government contends that the true rule is, not that notice of a forgery must be given within a reasonable time of its discovery, but that the plaintiff may recover, no matter how long the delay, provided that it does not affirma-

tively appear that the defendant has suffered actual damage thereby.

That rule is laid down in a small number of cases, but it will be found upon analysis that in most of them notice of the forgery was in fact given shortly after its discovery, so that it was not necessary for the court to decide that unreasonable delay in giving notice was not fatal. For example, in *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259; aff'd 64 Fed. Rep. 703, the forgery was discovered in two years, but notice was given to the defendant within three days thereafter. It was held that the plaintiff might recover.

Proof of damage by the delay in giving notice is not necessary. *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163; *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333; *Continental National Bank* v. *National Bank of the Commonwealth*, 50 N. Y. 575; *Raymond* v. *Baar*, 13 Serg. & Rawle (Pa.), 318; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 33, 46; *McNeely Co.* v. *Bank of North America*, 70 Atl. Rep. 891.

Pension checks are commercial paper. It is immaterial whether the instruments here involved are to be termed bills of exchange, drafts, checks or notes. They are in the ordinary form of a mercantile check, and it is enough that they have been held to be commercial paper by every court before which the question has come. In all the cases cited by the parties in their original briefs in the court below, whatever differences of opinion there may have been on the question of necessity of proof of damage, all the judges agreed that paper of the kind in question was negotiable. *United States* v. *Clinton National Bank*, 28 Fed. Rep. 357; *United States* v. *National Park Bank*, 6 Fed. Rep. 852; *United States* v. *Central National Bank*, 6 Fed. Rep. 134; *United States* v. *Onondaga Savings Bank*, 39 Fed. Rep. 259; *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163; *United States* v. *Cooke*, Fed. Cas. No. 14,855; *Wells, Fargo & Company* v. *United States*, 45 Fed. Rep. 337, 340; *United States* v. *American Exchange Bank*, 70 Fed. Rep. 232;

*Bank of the Republic* v. *Millard*, 10 Wall. 152; *First National Bank* v. *Whitman*, 94 U. S. 343.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

A preliminary matter needs to be noticed. In the opinion of the Circuit Court of Appeals it is said (italics ours):

"The precise form of only one of the so-called checks is shown by the record, as follows:

'United States Pension Agency, No. 297073.
Boston, Mass., Mch 5 1892
Assistant Treasurer of the United States
Boston, Mass.
Pay to the order of Mahala B. Jaques 9492 PS1
Thirty-six 100 Dollars. $36
36 Interior
W. H. OSBORNE,
*U. S. Pension Agent.*
Paid Mar. 12, 1892
ASST. TREAS., *Boston.*
Indorsements:
MAHALA B. JAQUES
*Payee.*
M. M. ANGELL
'Pay Nat. Bank of the Republic, Boston or order, for collection, for account of First National Bank, Providence, R. I.
C. E. LAPHAM,
*Cashier.*
Indorsement Guaranteed.
Nat'l Bank of the Republic, Boston.'

'This is, however, understood to be a sample of the remaining checks. As they were drawn by the pension agent on the Assistant Treasurer of the United States, the question naturally arises whether, after all, they were anything more than official warrants, a question which we will turn to later. *It will*

*be observed, however, that no indorsement by the Exchange Bank appears on the sample shown in the record, and whatever indorsement there is is simply 'for collection.'"*

The sample check thus referred to is also set out in the opinion delivered in the Circuit Court. But no such check is in the record, nor is it embraced in the list of checks collected by the Exchange Bank, and for which recovery is sought by the United States. Presumably the stated sample check must have been inadvertently taken from the record in an action against some other bank. At all events, as it is not in argument questioned that the Exchange Bank was the holder of the checks sued for, when they were paid by the United States, we shall assume the correctness of the recital in the agreed statement of facts, that the checks "with the forged signatures thereon were cashed by the defendant, who immediately indorsed the said checks to a national bank in Boston for collection."

The Circuit Court of Appeals reversed the judgment in favor of the United States upon the ground that by the operation of an exceptional rule, said to prevail, under certain conditions, as to commercial paper, the United States could not recover for the mistaken payments, as there had been unreasonable delay in giving notice to the Exchange Bank after the discovery of the forgeries. The correctness of this action is assailed in the assignments of error, the Government contending that the pension checks in question were mere Treasury warrants, not commercial paper in the true sense of that term, and hence not controlled by the so-called exceptional commercial rule, but that even if the checks were commercial paper and governed by such rule mere negligent delay in giving notice of the discovery of the forgery would not prevent recovery, unless the Exchange Bank established by proof that it had thereby suffered damage. It is besides claimed that if the agents of the Government were negligent in giving notice of the discovery of the forgeries, their laches cannot be imputed to the United States. The Exchange Bank not only traverses

these assignments but insists that the claim of the United States to recover was rightfully rejected, because the duty was on it not only to give prompt notice of the discovery of the forgeries but also to discover the forgeries promptly after payment, a contention which is controverted by the Government.

In order to simplify the issue for decision we concede, for the sake of the argument only, that the forged instruments were not official warrants as contended by the Government, but in a generic sense are to be classed as negotiable commercial paper, and that in a case coming within the exceptional rule referred to the laches of the authorized agents of the Government can be imputed to it. But, assuming the instruments to be negotiable paper the question yet remains whether the right of the United States to recover from the Exchange Bank is controlled or limited by the exceptional rule referred to.

That in certain classes of cases an exceptional rule is enforced in England as to commercial paper, by which, under particular circumstances, such paper is taken out of the operation of the general rule relating to the recovery of money paid by mistake is not subject to question. *Price* v. *Neale*, 3 Burr. 1354; *Smith* v. *Chester*, 1 T. R. 654; *Smith* v. *Mercer*, 6 Taunt. 76; *Wilkinson* v. *Johnson*, 8 Barn. & Cresw. 428; *Cocks* v. *Masterson*, 9 Barn. & Cresw. 222. The decisions referred to, however, show that the exception was limited to cases where the person who paid a forged instrument and who sought recovery of the amount paid was charged with knowledge of the genuine signature of the person whose name was forged, and, therefore, was presumed to have been negligent in making the payment. For instance, where one accepted a draft purporting to be drawn upon him by a customer whose signature he was presumed to know, which afterwards turned out to be a forgery. Again, where a draft which purported to have been accepted, and by the seeming act of acceptance was made payable at a particular bank which paid the same for account of its customer, the apparent acceptor, and it afterwards turned

out that the acceptance was a forgery, the exceptional rule was applied.

Several of the English cases above cited were reviewed by this court in *Bank of the United States* v. *Bank of Georgia*, 10 Wheat. 333, 348, *et seq.* In that case recovery of moneys paid was denied to a bank which had received as genuine notes it had issued, but which had been fraudulently altered as to amount after being put in circulation, the decision having been rested (p. 353) "upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts."

The exceptional rule was thus noticed in the opinion delivered in *Cooke* v. *United States*, 91 U. S. 389, 396.

"It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper, accompanied by payment, is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay, under such circumstances, is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 45: 'The party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his action.'"

Although it has been considered that in later cases courts of England have mitigated the strictness of the exception upheld in the cases we have previously cited, and have made the right to recover back embraced in such cases depend somewhat upon the prejudice occasioned by the delay in giving notice (Chitty on Bills, 464), it is certain that the exception has not been extended so as to cause it to include a case like the one before us. *Imperial Bank of Canada* v. *Bank of Hamilton* (1903), A. C. 49. And, although the courts of some of the States of the Union have limited, restricted, or declined to follow the exceptional rule—see the subject reviewed in *Greenwald* v. *Ford* (1906), 21 S. Dak. 28, and *First National Bank* v. *Bank of Wyndmere* (1906), 15 N. Dak. 299—we have been cited to no decision of a court of last resort, involving a case like the one before us, where it was held that such a case is controlled by the exceptional rule. True it is a decision of the Supreme Court of New York, rendered in 1841 (*Canal Bank* v. *Bank of Albany*, 1 Hill, 287), involving analogous facts, has by some text-writers been treated as holding a doctrine which might be considered as establishing that the exceptional rule, as somewhat qualified by the decision in question, would be applicable to a case like the one before us. In the case referred to it was decided that where the bank upon which a draft was drawn paid it in ignorance of the fact that the supposed signature of the person to whom it was payable had been forged, it could not recover back the money without exercising reasonable diligence to give notice after the discovery of the forgery. We think, however, it is apparent that the court considered not that it was applying the exceptional rule, but that it was simply announcing its conception of the general principle as to the right to recover back money paid by mutual mistake. This is evident, since the court, after holding that the case before it was not governed by the exceptional rule, remarked that "where each party enjoys the same chance of knowledge, no case demands anything more than reasonable diligence in giving notice after the discovery of the forgery." No authority,

however, was cited on this proposition, nor was any intimation given by the court as to whether, even if there had been negligence in giving notice, recovery would not be permitted if no damage had been occasioned by the delay to the party to whom the payment had been made. A later case in New York enforced a principle which we deem applicable to the present controversy. The case is *White* v. *Continental Nat. Bank*, 64 N. Y. 316. The facts were these: A customer of the firm of White & Co. drew a draft on that firm for $27. After the delivery of the draft to the payee it was raised to the sum of $2,750. The raised draft came into the possession of the Continental National Bank of New York city, who took the same from a customer who was credited with and drew the amount. The Continental Bank presented the draft to White & Co., and that firm accepted the same, payable at the Leather Manufacturers' National Bank. When due the Leather Manufacturers' Bank paid the Continental Bank and debited the account of White & Co. This payment was made in August. Monthly accounts passed between White & Co. and its correspondent by whom the draft had been drawn, but the August account, which was rendered in the early part of September, was not examined. When the next account came along and was examined the alteration of the draft was discovered, and White & Co., evidently being bound to the Leather Manufacturers' Bank by the payment made by that bank at the request of White & Co. and for their account, notified the Continental Bank, demanded repayment, and on refusal brought suit to recover. The trial court enforced the exceptional rule and denied the right of White & Co. to recover. The Court of Appeals, while substantially conceding that if the forgery had been of the name of the drawer of the draft, White & Co., because of their presumed knowledge of such signature, would have been, by their acceptance, brought within the exceptional rule decided, that the rule was not applicable because the forgery concerned not the signature but the body of the draft, of which White & Co. were not presumed to have knowl-

edge. Thus eliminating the exceptional rule, the court held that as the Continental Bank had presented the forged draft for payment, and had under the principles of commercial liability at least impliedly warranted its genuineness, the bank was liable to repay to White & Co. Although resting its conclusion upon the warranty on the part of the Continental National Bank of the genuineness of the instrument which it presented, the court, nevertheless, at the close of the opinion, observed (p. 322):

"But waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as a case of a mutual mistake, in respect to which neither was at fault, and in that view and upon that theory, the case is within the principles decided in *The Bank of Commerce* v. *The Union Bank* (3 Comst. 230); *The Kingston Bank* v. *Eltinge* (40 N. Y. 391)."

*White* v. *Continental National Bank* was cited and the doctrine therein expressed was approved and applied by this court in *Leather Mfrs. Nat. Bank* v. *Merchants' Nat. Bank*, 128 U. S. 26. The opinion in that case, delivered by Mr. Justice Gray, was announced on October 22, 1888, and was subsequent in date to several decisions of lower Federal courts cited in the opinion of the court below in this case, and which were deemed to conclusively demonstrate that the United States was not entitled to recover. In the *Leather Manufacturers' Bank case* the question for decision was thus stated in the opinion (p. 34):

"The question then is whether, if a bank, upon which a check is drawn, payable to a particular person or order, pays the amount of the check to one presenting it with a forged endorsement of the payee's name, both parties supposing the endorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money, or only after a demand for its repayment."

The right of action was held to have accrued upon the pay-

ment of the money. After distinguishing the case from one which involved the relations of a bank and its depositors, the court said (p. 34):

"But as between the bank and the person obtaining money on a forged check or order, the case is quite different. The first step in bringing about the payment is the act of the holder of the check, in assuming and representing himself to have a right, which he has not, to receive the money. One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy* v. *Bank of Cincinnati*, 18 Wall. 604; *Gurney* v. *Womersley*, 4 El. & Bl. 133; *Cabot Bank* v. *Morton*, 4 Gray, 156; *Aldrich* v. *Jackson*, 5 R. I. 218; *White* v. *Continental Nat. Bank*, 64 N. Y. 316.

"Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when, in fact, he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment.

* * * * * * * *

"In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by

the defendant after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date."

We are of the opinion that the case before us is directly within the principle governing the ruling made in the case just cited as well as within the doctrine of *White* v. *Continental National Bank*, which in effect, as we have shown, was approved by this court in *Leather Manufacturers' National Bank* v. *Merchants' Nat. Bank*. The United States is not before us as the acceptor of a draft drawn upon it and charged with knowledge of the signature of the drawer; nor was it a bank which had paid the check of a depositor and was charged with knowledge of the signature of such depositor. The forgery here was in the name of the payee, and it is therefore impossible, as it was in the case of *White* v. *The Continental Bank* and in the *Leather Manufacturers' Bank case*, to bring this cause within the exceptional rule without holding that the United States was charged with knowledge of the signatures of the vast multitude of persons who are entitled under the law to receive pensions. The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed. But con-

clusive as are these considerations, the case does not alone depend upon them, since we think legislation of Congress in reason precludes the conception that it was contemplated that the United States (or its agents) had actual knowledge of the signatures of pensioners and in paying pensions was bound to all the world under such an assumption.

By §§ 4764 and 4765, Rev. Stat., it is required, before a pension check shall be issued, that vouchers shall be supplied, and the duty is cast upon the Secretary of the Interior of making rules and regulations to establish the identity of the pensioner. As shown by the record, the regulations thus promulgated require vouchers to be signed in duplicate before an officer authorized to administer an oath or before a fourth-class postmaster. The pensioner is required to exhibit his pension certificate to such officer and also to sign and make oath to a statement as to his identity, his existing right to the pension and his post office address. The officer is required to certify as to inspection of the pension certificate; that the pensioner was fully identified; that he had signed the duplicate receipts; and the address of the pensioner is to be stated in the certificate. These requirements are incompatible with the assumption that the Government was chargeable with knowledge of the identity, continued existence, and right to pensions, or with the signatures of those entitled to receive pension moneys. The requirement by the Government of proof, for its own protection, affords no ground for the contention that as to any action taken as the result of the furnishing of such proof the Government is estopped as to third parties from showing that the proofs furnished were false and fraudulent and that the Government had been deceived thereby. To so hold would be to say that from the act of exerting a precaution against fraud there arose a presumption by which the fraud could be successfully accomplished. This would be the case if it were now held that because by forged vouchers the Government was deceived into acting third parties had a right to rely upon the integrity of the proof and to estop the Government as though

representations as to the verity of such proof had been made by it to such third parties. The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments and cannot be enlarged so as to relieve the bank from the obligation of warranty implied in the presentation of the checks and the collecting of the amount. The subject is aptly illustrated in the opinion by Coxe, Judge, in *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259, affirmed by the Circuit Court of Appeals for the Second Circuit in 64 Fed. Rep. 703.

As the nature of the forgery did not cause the case to be controlled by the exceptional rule, and as the Exchange Bank when it presented the checks and obtained thereon the money of the United States by operation of law warranted the genuineness of the instruments which it thus presented and upon which it asked and received payment, it follows that the case in substance is accurately portrayed in observations made by the Court of Appeals of New York in the *White case*, at pages 320–321:

"The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery,

which invalidated the bill and its title to the moneys represented by it."

Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged indorsement having been broken at the time the checks were cashed by the United States, and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the defendant.

The conclusion to which we have thus come renders it unnecessary to consider whether if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery if there was lack of such diligence, it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay.

The judgment of the Circuit Court of Appeals must be reversed and the judgment of the Circuit Court affirmed.

*And it is so ordered.*

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OCEANIC STEAM NAVIGATION COMPANY.